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N O. 2 2 0 7 9

3460

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

V. 3460

JOHN LEANDRO PISANI,  
a. k. a. JOHN PARENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S OPENING BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

PAUL CARUSO

400 South Beverly Drive  
Beverly Hills, California 90212

Attorney for Appellant

FILED

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WM. B. LUCK, CLERK





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---

APPELLANT'S OPENING BRIEF

---

I

STATUTES UNDER WHICH DEFENDANT IS  
BEING PROSECUTED

---

The defendant was convicted of violation of 26 United States Code, Sections 4411 and 7201 on June 12, 1967.

Section 4411 states in pertinent part:

"There shall be imposed a special tax of \$50 per year to be paid by each person (who is engaged in the business of accepting wagers) . . . or who is engaged in receiving wagers for or on behalf of any person so liable."





Section 7201 states:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned for not more than 5 years, or both, together with the costs of prosecution."

## II

THE AFFIDAVIT OF LOUIS BARISH, MADE  
A PART OF THE COMPLAINT, IS WHOLLY  
INCONSISTENT WITH THE MAIN TEXT OF  
THE COMPLAINT, RESULTING IN NO CRIME  
BEING CHARGED

---

The complaint alleges that defendant violated 26 U. S. C. §§ 4411 and 7201, during the period between July 1, 1966, and November 19, 1966; the affidavit of LOUIS BARISH rebuts such a charge, and it is solely upon the affidavit of Louis Barish that the complainant is able to allege any "act" whatsoever upon which to base a criminal complaint.

The affidavit of Louis Barish originally stated that the last wager he "placed with Parenti was 6 or 7 months ago". This obviously takes anything whatsoever Mr. Barish allegedly did with Mr. Parent (sic) outside of the time period charged in the complaint. Six or seven months prior to the date Mr. Barish signed his affidavit on November 18, 1966, identifies a time period in the vicinity of approximately April 18, 1966 to May 18, 1966. The





complaint charges the "crime" was committed between July 1, 1966, and November 19, 1966.

However, the affidavit of Louis Barish was changed to read: "The last wager I placed with Mr. Parent (sic) was 4 to 6 months ago". Once again, if the last wager were placed 5 or 6 months prior to November 18, 1966, the time period would again be outside the scope of the time period charged in the complaint. If, as alleged with such great uncertainty by Mr. Barish, the wager was placed in the 4th month prior to the signing of his affidavit, only 13 of the days of said 4th month (July) fall within the time period charged in the complaint.

Mr. Barish also stated in his affidavit that he placed wagers with either Mr. Parenti or Mr. Farkas. Hence, there nowhere appears a statement that any wager was placed (let alone "received or accepted", as required under the sections Parenti allegedly violated) directly with Parenti during the only time period applicable in Mr. Barish's affidavit -- July 18 through July 31, 1966.

To charge a crime under 26 U. S. C. §4411, the defendant must be "engaged" in the business of "receiving wagers".

That defendant must be "engaged in business of receiving wagers" to violate 18 U. S. C. §4411 see U. S. v. Forys (D. C. R. I. , 1953), 113 F. Supp. 580 (Acceptance of a single wager does not make acceptor subject to "occupational" tax imposed upon person who is "engaged in receiving wagers."); Lewis v. U. S. (App. D. C. , 1955), 75 S. Ct. 415 (using term "engaging in business").



There is no substantiation in Mr. Barish's affidavit that Parenti was engaged in the business of receiving wagers during the period charged in the complaint.

### III

COMPLAINANT HAS NO PERSONAL KNOWLEDGE,  
NOR BASIS THEREFOR, TO CHARGE  
DEFENDANT WITH ANY CRIME

---

That the complaint must be based on the personal knowledge of the complainant, see:

United States v. Langsdale (D. C. Mo., 1953),  
115 F. Supp. 489, 491;

Giordenello v. United States (1958), 357 U. S. 408;

United States v. Bosch (D. C. Mich., 1962),  
209 F. Supp. 15;

United States v. Greenberg (9th Cir., 1963),  
320 F. 2d 467.

In Giordenello, supra, at pp. 486 and 487, the court stated:

"The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.





"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matter contained therein; . . . We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer." (Emphasis added).

The requirement of personal knowledge is not changed by the fact that 18 U.S.C. §3045 authorizes commissioners to sign complaints for violations of internal revenue laws. The deficiencies of a complaint failing to show personal knowledge cannot be supplied by reliance by the commissioner upon a presumption that the complaint was made on the personal knowledge of the complaining officer.

Giordenello, supra.

One line of cases goes so far as to hold that a complaint is insufficient if it alleges that the complainant conducted an investigation of the defendant's tax liabilities by examining his tax records, by interviewing third persons with whom the defendant did business, by consulting public and private records relating to defendant's income, and interviewing third persons having



knowledge of the taxpayer's financial condition, as a result of which investigation the complainant had knowledge that the defendant had evaded internal revenue laws -- not sufficient personal knowledge of the complainant. See United States v. Barbanell (D.C.N.Y. 1964), 231 F.Supp. 200.

#### IV

#### SUFFICIENCY OF AFFIDAVITS GIVING MAG- ISTRATE PROBABLE CAUSE TO ISSUE WAR- RANT

---

The basic question to be determined here is whether there was sufficient evidence presented before the magistrate, so that he was able to decide for himself that there was probable cause to issue the warrants which he subsequently did.

The determination of probable cause is a function of the magistrate and not of the agents or anyone else.

"The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. United States, 333 U.S. 10, 13-14.

This statement hits at the heart of the matter. Agents them-



selves might become so wrapped up in a case that they fail to see the error of their ways. That a man is "innocent till proven guilty" should apply at the initial stages of an action also. Hence it is the magistrate who must decide, and his decision must come only from the information which he has before him. This last point was affirmed in Aguilar v. Texas (1964), 378 U.S. 108, where the court said a reviewing court may pass only on information brought to the magistrate's attention. Facts which may be put forth later cannot justify the issuance of a previous warrant.

"Here the mere conclusion that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, it does not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge."

Aguilar, page 113.

It is seen that facts must be stated specifically, and that there must be some manner of crediting the statements made. If this is not done, the warrant cannot be issued, since there is lack of probable cause.

This brings us to the issue of underlying circumstances. Perhaps the best case to begin with is People v. Tillman (1965), 47 Cal. Rptr. 614). The court here was applying the Federal standard and concluded that: (1) "The statement of the informer





in the affidavit must be factual in nature rather than conclusionary." (2) "That the informer had personal knowledge of the facts related." (3) "The affidavit must contain some underlying factual information from which the issuing judge can reasonably conclude that the informant whose identity need not be disclosed, was credible or his information reliable." Tillman, page 617.

These ideas were supported in Travis v. United States, 362 F.2d 477, 479, where it was said that personal knowledge by the affiant is not necessary if the affidavit puts forth (1) the underlying circumstances from which to conclude there is probable cause, and (2) alleges such circumstances that the magistrate can conclude that the informer was credible and the information reliable.

Thus far, it has been shown that the affidavit must state facts, not conclusions; these facts and/or the informer must be credited; and if these are not present, there must be a minimum of, at least, personal knowledge, though this may not suffice by itself. Conclusions are not enough; there must be facts from which the magistrate can draw his own inference.

Applying the above criteria to the instant case, there is good reason to believe that the agent (Stutz) did not comply with this standard. In his own affidavit, there are no factual statements whatsoever. Paragraph 3, concerning the statement of Freedman is conclusionary. It states only that "Mr. Freedman stated that . . . John Parenti was also operating as a bookmaker . . . and accepting wagers." There are no facts to verify this, no underlying



circumstances are shown; there is nothing present in the affidavit crediting Freedman's information or himself (the fact that he was arrested on 30 October, 1966, and then making this statement is certainly not to his benefit in establishing his credibility). Nothing is stated to show that he even had personal knowledge of this information. Hence, a perfect application of the question from Aguilar, cited supra.

Paragraph 4 of the supporting affidavit consists of information given by a "reliable" informant. In the affidavit, it says that the informer "Stated that John Parenti is currently operating as a bookmaker . . . and that wagers can be placed with Mr. Parenti." Once again, Aguilar may be cited. There is no allegation of personal knowledge; no facts upon which to base this conclusion are present; no underlying circumstances to credit the informer. (The fact of the telephone number in question is not enough to justify the warrant. The affidavit "concludes" that wagers can be placed on this line; it does not cite any occasions that this was done.)

Paragraph 7 does not lend a thing to the underlying circumstances justifying the warrant. It just states that John Parenti has not registered or paid the tax required under §§ 4412 and 4411 respectively. But this assumes the conclusion; there are still no facts, or any acknowledgement of personal observation, or crediting of any informers. so that a magistrate could conclude from the facts as given, that there was probable cause.

If Agent Stutz had alleged some personal surveillance, or





some verification of the information given, then perhaps it would have been sufficient. In United States v. Ventresca (1965), 380 U.S. 102, the affidavit was upheld, though based on hearsay information of others. The key to that case was that the agent had done some independent investigation, and therefore had knowledge of facts upon which to credit the hearsay testimony. "Based upon observations made by me" prefaced the affidavit.

This is not so in the present case. There is no allegation by Stutz to that effect. Thus, we are, from the government's most favored view, but one step away from probable cause. But that is enough; for without that verification, we return to the defects listed above.

There remains to be considered the affidavit of Louis Barish. Once again, the same problems arise. An exception is that it does seem that Barish is speaking from personal knowledge. Stutz does not make any statement by which to verify these facts. And query: is the uncorroborated statement of what seems to be an accomplice is good enough, by itself, for a magistrate to conclude that probable cause is present? The government, in its Opposition to Motion to Dismiss Complaint, conceded that the affidavit of Barish alone would not supply probable cause of an arrest.

Thus, the issue turns on the affidavit signed by Stutz. If that is insufficient, Barish's is not good by itself; if it is good, Barish is incorporated in it via paragraph 6. Assuming the above arguments are valid as against Stutz's affidavit, then Barish's affidavit should fall also.



In Jones v. United States, 362 U.S. 257, the court said that information received by an informer "is not deemed to be insufficient on that score, so long as a substantial basis for crediting the hearsay is present. . . . he (agent) may rely upon information received through informant . . . so long as . . . (it) is reasonably corroborated by other matters within the officer's knowledge." Jones, 271.

Jones also sets out the criteria for this substantial basis (underlying circumstances):

1. That the informer had previously given reliable information;
2. Informant's story was corroborated by other sources of information;
3. Defendant was known by the police to be in the business of which the violation is concerned. Jones, page 269.

In the existent case, point one (1) is present only with regard to paragraph 4 of Stutz's affidavit. The other two points are not alleged at all within either affidavit. It therefore, seems that the magistrate acted without probable cause in allowing the warrant to be issued.

A search warrant may be issued by a magistrate only upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property to be seized and the place to be searched.

Cal. Const. Article I, §19;

Penal Code §§ 1523, 1525;



People v. Keener (1961), 55 Cal.2d 714,  
12 Cal. Rptr. 859, 861.

"Probable cause for the issuance of a search warrant may be based on information furnished by an informant if the supporting affidavit also recites facts indicating that reliance on the information is reasonable."

People v. Keener (1961), 55 Cal.2d 714,  
12 Cal. Rptr. 859, 862;

Arata v. Superior Court, 153 Cal. App. 2d 767, 772-  
773, 315 P.2d 473;

People v. Acosta, 142 Cal. App. 2d 59, 63-64,  
298 P.2d 29.

In People v. Keener, supra, the court held that the affidavit supporting the search warrant was adequate in that it contained statements by the officer of additional facts known to him which indicated that the informant was reliable and which corroborated some of the information.

People v. Govea (1965), 235 Cal. App. 2d 347,  
45 Cal. Rptr. 253, 261-262.

In Govea, the affidavit set forth numerous positive, factual allegations made from the personal knowledge of the affiant, such as: (1) the officer's knowledge that defendant was a known narcotics user; (2) the officer's rendez-vous with an operator and surveillance of a sale of narcotics; (3) the officer's hearing of a conversation concurrent with a sale of narcotics; (4) information





from an operator that a sale had been made; (5) personal knowledge of the officer, from personal surveillance that the suspects had lived on the premises searched for two months. The court found the affidavit supporting the warrant satisfactory, stating:

"As pointed out (the affidavits) mainly consist of positive statements of Detective Walker . . . As to that portion of the affidavit relying upon information from the operator, it is clear that the facts known to Walker of his own personal observations corroborated the information (of the operator) . . .

"Accordingly, probable cause for the issuance of a search warrant may be based on information furnished by an informant, even though not identified by name, if the supporting affidavit also recites facts indicating that reliance on the information is reasonable. (citations omitted). Evidence substantiating reliance by the police on such information may be of different kinds, including, inter alia, the personal knowledge and observations of the police officers." (Emphasis added)

People v. West (1965), 47 Cal. Rptr. 341, 344-345;

"(3) The affidavit on which the warrant was issued sets forth a police officer's belief that probable cause to search exists, based on (1) information from a reliable, confidential informant that West was using, selling, and possessing narcotics at



Apartment 3 with a girl named Lou Ann; (2) registration of the utilities at Apartment 3 to Lou Ann Douglas; and (3) a record of prior narcotics convictions for West and Lou Ann Douglas.

"(4-6) Is this enough to establish probable cause: We think not. In our view the specific question is controlled by the decision of the United States Supreme Court in Aguilar v. State of Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, a case reversing a narcotics conviction in a state court because of the insufficiency of the affidavit supporting the search warrant. In Aguilar, the Supporting affidavit set forth a police officer's belief that petitioner kept narcotics for sale at a particular address, a belief based on unspecified information from a reliable informant and on unspecified observations of the premises by the police. In holding that the affidavit did not establish probable cause, the Supreme Court said that the unamplified conclusion of a reliable, confidential informant was an inadequate foundation from which to launch a search warrant. The facts supporting the informant's conclusion must be sufficiently developed in the affidavit to enable the issuing magistrate to judge for himself the persuasiveness of the information relied upon for probable cause. The affidavit in Aguilar failed to show that the police



officer or his source had any personal knowledge of the matters set forth in the affidavit. For all that appeared, said the court, the source may have merely suspected the presence of narcotics in petitioner's possession. The Supreme Court then summarized the applicable rule: 'Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 367 U.S. 528, 84 S.Ct. 825 (11 L.Ed.2d 887), was "credible" or his information "reliable".' " (378 U.S. at 114, 84 S.Ct. at 1514.)

"Nothing in the subsequent case of United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684, altered these basic requirements. Although the validity of the search warrant in question was upheld, the Supreme Court there pointed out: 'This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists





without detailing any of the "underlying circumstances" upon which that belief is based. See Aguilar v. State of Texas, supra. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police'."

380 U.S. at 108-109, 85 S.Ct. at 746.)

"(7) Aguilar makes clear that a petition for a search warrant based solely on information from a reliable informant must set forth sufficient data in the supporting affidavit (1) to show that the informant is in fact reliable, and (2) to disclose the source of the informant's knowledge so that the examining magistrate can himself determine whether probable cause exists for the issue of the warrant."

## V

### THE COMPLAINT IS DEFECTIVE IN THAT IT ATTEMPTS TO ENCOMPASS MORE THAN ONE OFFENSE IN ONE COURT

---

The complaint attempts to charge, or at least is not clear as to whether or not it is charging, failure to register, pay a tax, file a tax return, or any other offense outlined in 18 U.S.C.

§§ 4401, 4411, 4412 and 7203.

A gambling tax information charging defendant with wilful failure to register and to file returns was defective and



objectionable as encompassing more than one offense.

Driscoll v. United States (C. A. Mass., 1966),  
356 F. 2d 324.

## VI

THERE IS NO CORROBORATION OF THE  
TESTIMONY OF ROBERT FREEDMAN; NO  
STATEMENT THAT MR. PARENTI "RECEIVED  
OR ACCEPTED" WAGERS, BUT ONLY THAT  
WAGERS COULD BE "PLACED" BY CALLING  
A CERTAIN NUMBER

---

## VII

DISTINCTION BETWEEN §§ 7201 AND 7203  
OF TITLE 26 OF U. S. C. A.

---

The legislative history behind the enactment of §7201 sheds light upon its meaning and its purpose above and beyond §7203.

"Any person who wilfully attempts in any manner to evade or defeat any tax . . . shall be guilty of a felony." 26 U. S. C. A. §7201.

"Any person required under this title to pay any estimated tax or tax, . . . who wilfully fails to pay such estimated tax or tax, . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor." 26 U. S. C. A. §7203.

Section 7201 was to be in addition to §7203. The distinction which the House made was that §7201 was to apply only to the "failure to make a tax return." All other returns were still subject



only to §7203 of the Code. The Senate amended this, so that §7201 would apply to the "wilful attempt to evade or defeat any tax." The failure to file a tax return, wilful or otherwise was, and is, to be covered by §7203. This amendment was accepted and became the law as we now have it. 1954 U.S. Code. , Congressional & Amd. News, pp. 4572, 5251, 5343.

Concerning the definition of "wilful" as construed by the cases, one notices that there is a distinction between the criteria for its meaning as used within §§ 7201 and 7203 of the Code. It has been said that "wilful" means more when the issue is non-payment of a tax than when the issue concerns a failure to make a return. Spies v. United States (1942), 317 U.S.C. 492. It states that if the issue were failure to make a return, "voluntary and purposeful" would suffice to show "wilful". But, this would not be enough in the former issue.

"The difference between the two offenses . . . is found in the affirmative action implied from the term 'attempt' as used in the felony subsection. . . . We think Congress intended some wilful commissions in addition to wilful omissions." Spies at 498, 499.

From this, one sees that something more than wilful, per se, is needed. A wilful but passive neglect of statutory duty may constitute violation under §7203, but for §7201, to be applicable, there must be a deliberate act capable of deceiving, misleading, or defeating the tax obligation and this must be intentionally employed by the defendant for tax evasion reasons.





Consequently, for a violation of §7201, there must be shown a subjective state of mind (wilful) plus affirmative activity. United States v. Jannuzzio (1960), 184 F.Supp. 460.

Further, it is stated in Brideforth v. United States (1956), 233 F.2d 451, that a "wilful omission to make a return and pay such a tax" does not violate "Wilfully and knowingly attempting to evade and defeat such tax and wages". Here, defendant filed his return, omitting this special tax, and the court held that this itself was not enough to show "wilfulness".

In conclusion, let it be said that more than a voluntary omission is necessary for defendant's acts to come within the scope of §7201. Some affirmative action must be coupled with this voluntariness. Thus, this action must be shown. The evidence failed to establish a "wilful" violation of §7201.

## VIII

26 U.S.C., §4411 IS UNCONSTITUTIONAL IN  
THAT IT INFRINGES UPON THE PRIVILEGE  
AGAINST SELF-INCRIMINATION AS GUARAN-  
TEED BY THE FIFTH AMENDMENT OF THE  
UNITED STATES CONSTITUTION

---

Wagering is a statutory crime in California. California Penal Code, §337a. By forcing one to register and pay a wagering tax under Federal Statutes is to compel one to incriminate himself under state penal laws.

It is recognized that the above argument has been rejected by the United States Supreme Court in the cases of United States v.



Kahriger (1953), 345 U.S. 22, and Lewis v. United States (1955), 348 U.S. 419. However, since deciding both of those cases, the United States Supreme Court has widely expanded the scope of the Fifth Amendment privilege against self-incrimination and has granted certiorari in the case of United States v. Costello (1965), 352 F.2d 848, cert. granted 383 U.S. 942 (1966), limiting its review to the issue of self-incrimination.

In the Kahriger and Lewis cases, the United States Supreme Court reasoned that the statute does not require registration of incriminating information; purchasing the tax stamps is a condition precedent to doing business as a gambler, so registration is only required as to prospective acts; the privilege against self-incrimination protects against the revelation only of past acts which are incriminatory.

This statutory interpretation has been sharply criticized. See, e.g., Lewis v. United States (1955), 419, 423-425, (Black, J., dissenting); United States v. Kahriger (1953), 345 U.S. 22, 36-37 (Black, J., dissenting); Blake, Self-Incrimination, Registration Statutes and George Washington's Cherry Tree, 23 L. in Trans. 197 (1963); Note, Constitutional Law - Federal Gambling Tax - Self-Incrimination, 29 N.Y.U.L. Rev. 217 (1954). It has been suggested with some force that the statute is not wholly prospective but that the registrant has incriminated himself the moment he registers. The language of the statute, which requires registration of any person who is engaged in the business of gambling, seems to support this argument. Mr. Justice Black has



characterized the registration form (Special Tax Return and Application for Registry, form 11-C) as a "written confession that (the registrant) is at the moment he registers 'engaged in the business of accepting wagers.' " Lewis v. United States (1955), 348 U.S. 419, 424 (Black J., dissenting). See also Blake, supra note 12 at 08-13. At least two states, Alabama and Tennessee, have been sufficiently impressed by this reasoning that they have made possession of the federal wagering tax stamp prima facie evidence of violation of state gambling laws. Ala. Code title 14, § 302 (8)-(10) (1953); in Tennessee the State Supreme Court upheld a similar city ordinance in Deitch v. City of Chattanooga (1953), 195 Tenn. 245, 258 S.W.2d 776.

Even if the statute requires information only of prospective acts, it has been argued that the information required would be sufficient to convict the registrant of conspiracy to gamble in violation of state law. This argument is based on the requirement that the registrant fill out a form which calls for, inter alia, the names and addresses of all those engaged in the business of accepting wagers for the registrant.

At least one case has upheld a conviction of conspiracy to gamble from possession of the federal wagering stamp. Acklen v. State (1954), 196 Tenn. 314, 267 S.W.2d 101. Or at least supply a link in the chain of evidence needed to convict. Compelled information which supplies the authorities with a "link" or "lead" has long been protected by the privilege against self-incrimination. E.g., Hoffman v. United States (1951), 341 U.S. 479; Blau v.





United States (1950), 340 U.S. 159; Counselman v. Hitchcock (1892), 142 U.S. 547. It might even be argued that the mere fact that the individual is required to register and thus single himself out from the general public is a "link" or a "lead" in itself, without considering the added information the authorities receive from the registration form. These arguments raise serious doubts as to the validity of the Supreme Court's decisions in Kahriger and Lewis.

Recently these cases were put in further doubt by Albertson v. Subversive Activities Control Board (1965), 382 U.S. 70, which involved a statute requiring registration of all members of the Communist Party. 64 Stat. 987-1006 (1950), 50 U.S.C. 781-798 (1951). The Supreme Court held that the statute was unconstitutional because the pervasive effect of the information call for is . . . incriminatory, 382 U.S. 79. The court distinguished this information from the questions on the ordinary income tax registration which are neutral on their face and directed at the public at large. The income tax was upheld in United States v. Sullivan (1927), 274 U.S. 259. In contrast, the communist registration statute was directed at a highly selective group inherently suspect of criminal activities, 382 U.S. at 79, and involved an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of the crime. The analogy to the Costello situation is clear. Gambling is an area permeated with criminal statutes; gamblers are a highly selective group inherently



suspect of criminal activity. Therefore, the pervasive effect of the wagering tax statute is incriminatory. Albertson creates considerable pressure for holding the wagering statute unconstitutional and over-ruling both Kahriger and Lewis. Although Albertson did not mention either the Kahriger or Lewis cases, it is clear that the situations are analogous and the Albertson reasoning is apposite. In granting certiorari in Costello, the Supreme Court recognized this analogy when it asked whether Kahriger and Lewis should be over-ruled in light of Malloy v. Hogan (1964), 378 U.S. 1, Murphy v. Waterfront Com. of New York Harbor (1964), 378 U.S. 52, and Albertson.

### CONCLUSION

Wherefore, appellant respectfully prays that the conviction be reversed.

Respectfully submitted,

PAUL CARUSO

Attorney for appellant



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Paul Caruso

PAUL CARUSO





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No. 22,081

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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|                              |   |
|------------------------------|---|
| KAREN JEAN HYMER,            | } |
| <i>Defendant-Appellant,</i>  |   |
| vs.                          |   |
| BENJAMIN K. CHAI, and        |   |
| VICTORIA LEILANI CHAI,       |   |
| <i>Plaintiffs-Appellees.</i> |   |

---

Upon Appeal from the United States District Court  
for the District of Hawaii

**OPENING BRIEF OF DEFENDANT-APPELLANT**

---

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No. 22,081

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

KAREN JEAN HYMER,

*Defendant-Appellant,*

VS.

BENJAMIN K. CHAI, and

VICTORIA LEILANI CHAI,

*Plaintiffs-Appellees.*

Upon Appeal from the United States District Court  
for the District of Hawaii

**OPENING BRIEF OF DEFENDANT-APPELLANT**

---

**JURISDICTIONAL STATEMENT**

The District Court had jurisdiction of the case under the provisions of Title 28 United States Code, Section 1332. The Defendant admits the jurisdiction of the District Court with respect to the claim of Mr. Chai, however, the Defendant denies jurisdiction of the Court with respect to the claim of Mrs. Chai as not reaching the required jurisdictional amount in controversy.

This Court has jurisdiction of the appeal under the provisions of Title 28 United States Code, Section



1291. This Court's jurisdiction has been obtained pursuant to the Federal Rules of Civil Procedure.

Plaintiffs' amended complaint alleged diversity of citizenship and an amount in controversy in excess of \$10,000 for *both* plaintiffs (R. 39). The question of jurisdiction was an Issue of Law in the Pretrial Order (R. 33).

---

### STATEMENT OF THE CASE

#### A. Introduction:

This is an action brought by Plaintiffs-Appellees (hereinafter referred to as Plaintiffs) to recover for personal injuries and general damages suffered as a result of an accident at an intersection of Kamehameha Highway and Lipoa Street in the City and County of Honolulu, Hawaii on September 20, 1965 as stated in the complaint, as amended (R. 3).

The complaint alleged negligence on part of Defendant and claimed general and special damages for the Plaintiff Mr. Chai for alleged injuries, in the amount of \$75,000 and general damages for the Plaintiff Mrs. Chai for loss of society and companionship, etc., in the amount of \$7,500 (R. 3-4).

An answer was filed by the Defendant setting forth the affirmative defenses of contributory negligence and assumption of risk (R. 8-9). In addition, a counterclaim was filed by the Defendant for damages of \$453.12 as a result of the negligence of the Plaintiff (R. 12). An answer to counter-claim was filed, alleg-

ing contributory negligence on part of Defendant (R. 19).

The trial was commenced on February 20, 1967 with the Honorable Martin Pence presiding with a jury (Tr. 1). A verdict for the Plaintiff (R. 85) was returned on February 27, 1967 (Tr. 593) in the amount of \$48,000 for Mr. Chai (Tr. 594) and \$5,000 for Mrs. Chai (Tr. 594).

The Final Judgment (R. 88) was filed February 28, 1967 (R. 125). A Motion for New Trial (R. 90 et seq.) was filed March 8, 1967 (R. 125). The Motion for New Trial together with a new Motion to Amend the complaint filed by the Plaintiff (R. 99) were argued before the Honorable Martin Pence commencing on March 31, 1967 (R. 125). Both motions were denied on April 5, 1967 (R. 125). Notice of Appeal was filed by the Defendant on May 2, 1967 (R. 115).

#### **B. Facts:**

The accident giving rise to this action took place during morning rush-hour traffic September 20, 1965 (Tr. 188) on a heavily travelled route in the City and County of Honolulu, Hawaii. The Defendant was traveling toward Ewa (westbound) on this route, in an automobile (Tr. 466). The Plaintiff was headed toward Honolulu (easterly) on a motorcycle (Tr. 178-180).

At the intersection of this main route, Kamehameha Highway, and Lipoa Street, where a left-hand deceleration lane was provided in the median (Tr. 467),

Defendant entered the left-turn lane and stopped (Tr. 24).

Meanwhile, Plaintiff had been proceeding in the center lane, nearest the median, and in the last 1 or 2 miles preceding the collision, changed into the right hand lane, then back to the center lane, then back again to the right lane, then finally to a new outside lane (Tr. 242). The status or classification of this outside lane was in issue at the trial. Plaintiff described this outside lane as a third lane of the highway (Tr. 325). Defendant described the lane as a deceleration-acceleration lane for the Lipoa Street intersection (Tr. 492). Police officers and others testified at the trial, that at the time of the accident, the lane extended for 1/10th of a mile or less on either side of the intersection (Tr. 66).

Defendant had waited for several minutes in the left-hand turn lane, since opposing traffic was heavy, and described as "stop-and-go" (Tr. 29). Finally, first the car in the center lane of opposing traffic, then another car in the adjoining opposing lane stopped, leaving the intersection clear (Tr. 29-30). Defendant then began a left-hand turn, at a speed testified to as less than 5 mph (Tr. 41).

Plaintiff was now proceeding down the outside lane at an admitted 32 mph (Tr. 182), although speed was in issue at the trial. The Witness Lawrence, himself a motorcyclist, testified that he could hear the Plaintiff's machine accelerating all the way down the lane until impact occurred (Tr. 149). The Witness Lawrence also testified that he could estimate the speed of

Plaintiff's vehicle at not less than 30 mph and possibly 40 to 45 mph (Tr. 154). The maximum posted speed limit was established at 35 mph (Tr. 86) at this point on the Highway. The Plaintiff's motorcycle struck the right side of Defendant's car, which was in transit across the third lane (Tr. 472), damaging the right front fender, the hood, and windshield (Tr. 475 and Exhibit C). The front of the motorcycle was demolished, and the motorcycle as a whole was damaged beyond economical repair (Tr. 224). The Plaintiff's body struck the windshield of Defendant's car (Tr. 489) and landed some distance away, with extensive injuries (Tr. 82). Neither party saw the other until the instant before impact (Tr. 185, 472). The extent of Plaintiff's injuries, and the reasonableness of costs of medical care were not contested (Tr. 4).

---

#### QUESTIONS INVOLVED

1. Did the Court err in allowing the claim of loss of consortium by Plaintiff's wife to proceed to judgment without jurisdiction of foundation in law?
2. Was it prejudicial error to exclude evidence offered to show Plaintiff's prior manner of driving his vehicle for the purposes of raising reasonable inferences that the manner of driving tended to contradict Plaintiff's testimony regarding attitude, state of mind and driving conduct?
3. Was it prejudicial error to exclude portion of Plaintiff's deposition from consideration by the

jury, where said portion related to Plaintiff's awareness of traffic conditions and to the credibility of Plaintiff as a witness?

4. Did the Court err in denying Defendant's Motion for New Trial, in the light of evidence of improper communications between the jury foreman and the Court Bailiff?
5. Did the Court err in denying Defendant's Motion for New Trial in light of a verdict not supported by the evidence?
6. Was it prejudicial error to deny Defendant's Motion for Mistrial after an improper question concerning a possible criminal conviction for traffic violation was asked of Defendant by the Plaintiffs' counsel in the presence of the jury?
7. Did the Court err in failing to control the final arguments of Plaintiffs' counsel which were misleading, confusing and referring to matters not in evidence?
8. Was it prejudicial error to refuse Defendant's Requested Instruction on the law regarding exercise of right-of-way at intersections?

---

#### **SPECIFICATION OF ERRORS**

1. **The Trial Court Erred in Allowing Mrs. Chai's Claim to Proceed to Judgment.**

The Court was without jurisdiction because the amount prayed in the complaint (R. 4) did not reach the jurisdiction minimum required by law.



The Defendant placed the matter of jurisdiction in issue in the answer (R. 8) and maintained the issue in the Pretrial Order (R. 33) under Issues of Law.

The claim of Mrs. Chai in the complaint, number 4 (R. 4), fails to state a claim for which relief may be granted as a matter of law:

“5. As a result of Defendant’s negligence, Plaintiff Victoria Leilani Chai was deprived of the services of her husband, Benjamin K. Chai, and her comfort and happiness in his society and companionship have been impaired, all to plaintiff Victoria Leilani Chai’s damage in the sum of \$7,500.”

**2. It Was Prejudicial Error to Exclude Evidence Offered to Show the Plaintiff’s Prior Manner of Driving.**

Plaintiffs’ counsel, anticipating the line of questioning which would have followed of the Witness Lawrence, asked for a bench conference (Tr. 123) where the following occurred:

“Mr. O’Connor: It is my understanding that Mr. Gould is going to elicit from this witness certain evidence concerning Mr. Chai’s driving of a motorcycle on Kam Highway that day somewhere, some distant point from this accident, and he is going to try to show that Mr. Chai was in fact violating a traffic ordinance somewhere back in Pearl City.

The Court: Is that correct?

Mr. Gould: Somewhere back before Pearl City.

The Court: Well, somewhere before this.

Mr. Gould: Some distance before this, yes.

Mr. O’Connor: The cars had stopped on the highway and Chai cut in between two cars along

the center line of the highway and then came back into the traffic lane. And I understand this is a violation of a section of the Traffic Code.

Mr. Gould: There was no question of it being a violation——

The Court: What is your offer of proof here? If this witness is asked a question what he observed Chai doing one-quarter, one-half or one mile before this point, what is your offer of proof——what the answer would be?

Mr. Gould: Well, his testimony will be that Chai passed him first on his right when there was a 3-lane highway; that shortly it came into a 2-lane highway, that Chai went in front of him and passed in between two lanes of traffic and then went ahead of two other cars, and then proceeded.

The Court: Well, the offer of proof is rejected. The objection to this line of proof is sustained.”

(Tr. 123-124.)

Defense attempted to introduce evidence of prior manner of driving, coupled with circumstances from which the jury could reasonably infer recklessness and willfulness, during the examination of Witness Officer Wong:

“The Court: What is your offer of proof? Put in your full offer of proof right now. If this witness were allowed to testify, what would he testify to?

Mr. Gould: If this witness were allowed to testify, he would testify that when he arrived at the scene of the accident, he recognized Chai as the person whom he had previously seen in the



area of Frankie's Drive-In on Kam Highway; that he observed Mr. Chai cutting in and out of the various lanes and passing in addition thereto, passing between several cars; that he was attempting to catch up with the driver in order to tag him but was unable to do so because of the traffic. That this offer of proof is made not for the purpose of showing any type of violation of any law by Mr. Chai but to show concrete, substantial and credible and important evidence.

The Court: Of what?

Mr. Gould: As to the hurrying and the way Mr. Chai was conducting himself, which is definitely related to his proceeding down Lane No. 3 just prior to the accident. And he, as a matter of fact, testified that his sole purpose of cutting in and out was to keep traffic moving. His testimony had indicated that it was a matter of him attempting to pass various lanes of traffic in order to speed towards his destination. And we think there is a definite relationship.

The Court: What would he testify to regarding speed? We are talking about speeding to his destination. All I heard so far is cutting in and out.

Mr. Gould: Your Honor, it must necessarily follow that when a person is cutting in and out, he is attempting to speed towards his destination.

The Court: That isn't the only inference to be drawn. Presuppose that traffic is crawling at the rate of 5 or 10 miles an hour and stopped, and if you went at 5 miles an hour then you would be cutting in and out but you wouldn't be speeding. You wouldn't show that you are hurrying.

Mr. Gould: If you were cutting in and out, Your Honor? This being the law, you would be showing the matter of hurrying.

The Court: All right. And what is your attitude? You object to this?

Mr. O'Connor: There would be evidence of prior negligence which would have no bearing on this case. And I object strenuously because it is extreme prejudicial.

The Court: Objection sustained. Now, then, you confine your witness to the scene of the accident. Whether he had seen him before is immaterial. Proceed."

(Tr. 402-403.)

In cross-examination of the Plaintiff, Defendant was again prevented from touching on the subject of prior driving even to test the credibility of the witness:

"Mr. O'Connor: I will object to that line of testimony.

The Court: Approach the bench."

(A conference was held at the bench between the Court and counsel in which the following occurred):

"The Court: What is your offer of proof? I will sustain the objection to the last question.

Mr. Gould: Your Honor, this is preliminary.

The Court: To what?

Mr. Gould: To test the credibility of the plaintiff in this area.

The Court: In what area?

Mr. Gould: In the area of his travel. He indicates he was cutting in and out of lanes—and this is to show that he was in a hurry. And, num-

ber two, that he passed an officer illegally, traveling between two cars. And he may very well have been in a hurry to go down that two-lane highway in order to avoid this officer catching up with him. I think, Your Honor, it is very relevant as to the course of the driving that he was pursuing. It was reckless and careless.

The Court: I already said that the matter of cutting in and out was one thing. If you want to go into the area that he was actually in a hurry when he says that he wasn't we have this factor here. What time it is agreed that this accident took place?

Mr. O'Connor: 6:45.

Mr. Gould: We have a deposition indicating that changing lanes to pick up time whenever he had the opportunity. He was cutting into the lanes.

The Court: Well, you confine it to the fact that he was in a hurry, and I will allow it. But if you go off into the area that he was trying to run away from an officer, which is purely speculative—was the officer in a car?

Mr. Gould: The officer was in a car. That is why he didn't catch him.

The Court: Have you got any deposition regarding that? Does it show that it was his state of mind that he was running away from an officer?

Mr. O'Connor: The deposition doesn't have anything like that.

Mr. Gould: We didn't get into that.

The Court: You recognize that whether there was an officer in this traffic, and purely coming down to the matter of the hurry, if he wanted to say that he changed lanes, and so forth, I will let

you go along solely for the purpose for trying to see whether or not when he said he was ten or fifteen minutes in traveling, and that it took him longer to start, to see whether or not he did have a reason to hurry——

Mr. O'Connor: Your Honor, the witness already testified that he didn't have a reason to hurry.

Mr. Gould: We have a right to test his credibility.

The Court: If it is in that position that you have him saying he was trying to make up time——

Mr. Gould: That is exactly it. The reason he pulled into that lane was to pick up some time.

Mr. O'Connor: That's fine. Why don't you ask him that? It is in the third lane when he gets to the intersection——

The Court: Solely in the area that you are trying to show that he was trying to pick up some time, I will allow it. But not for the purpose of showing he was violating any laws at all, whether he passed somebody on the wrong side or not. If you had a chance to depose him—until you have got something that will show that he was trying to run away from the officer—I will allow this. And that is it. So stay away from that, please, or I will have to say some harsh words within the hearing of the jury.”

(Tr. 232-235.)

**3. Trial Court Erred in Excluding Portion of Deposition Where Said Portion Related to Plaintiff's Awareness of Traffic and Credibility As a Witness.**

At trial, much effort had been made to elicit testimony from the plaintiff as to his visibility into the

intersection where the accident occurred (Tr. 283-322). The Plaintiff's earlier deposition had covered this subject, and was contrary to testimony being made at trial by Plaintiff. At the introduction of the deposition at trial, a bench conference was held, where the following occurred:

"Mr. O'Connor: The same objection.

The Court: The same objection, without the preamble, it all goes out down through line 5, through 19, on the grounds that this was all hashed and rehashed over when Chai was on the stand. Did I get that right, Page 31 Lines 1 through 19 are out.

On Page 33, the question is unintelligible to me to what is being referred to as this portion of the intersection.

Mr. Gould: I think this is one of the most sensitive areas of the whole deposition.

The Court: Never mind your conclusion. Just give me the facts.

Mr. Gould: Yes. These are the facts. The facts are that they clearly related to the question which was asked on Page 32, Line 19. I think that is it.

The Court: Let us read it. I will read it out loud. (To the reporter) Don't take this down. (Reading the section referred to) What is this portion?

Mr. Gould: Referring to the three lanes of traffic, they are talking about an area of two lanes of traffic, and those are the two lanes of traffic specifically that I was referring to.

The Court: 'As far as you know, these two lanes of traffic to your left kept right on moving across Lipoa Street?'



And he was asked, you couldn't see this portion of the intersection? What portion is it?

Mr. Gould: This portion where the two lanes of traffic were moving across Lipoa Street, which is on the way of defining that portion of the intersection very clearly.

The Court: Because it is unintelligible to me, I think it will be confusing to the jury and I cannot understand from the whole context what this portion is referring to, so I am going to strike for that reason.

I am going to strike on Page 33, Lines 3 to 7.

Mr. Gould: I want to make one other comment in this area.

The Court: This area, whatever it is.

Mr. Gould: This area that you are just striking off here. The answer, Your Honor, is so significant because I am looking ahead and I have to visualize it. It is a pretty wide intersection. There is no question—and even as Your Honor has indicated that it is unintelligible—but the witness indicated that he understood.”

(Tr. 432-434.)

At the time of taking his deposition, the Plaintiff Benjamin Chai testified:

“Q. And you indicated that when you were in the third lane, at the speed you were moving, you couldn't see this portion of the intersection. Is that true?

A. Because I'm looking ahead. I have to visualize all, and it's a pretty wide intersection there.”

(R. Dep. of Chai, 33.)

However, at trial, the Plaintiff testified:

“Q. As you were traveling along this third lane, were you able to observe the intersection insofar as Lanes 2 and 1 are concerned with Lipoa Street?

A. Do you mean if I was able to see into Lane 1 area as I traveled along?

Q. As you traveled along this third lane, were you able to observe the situation of Lipoa and Kam Highway on the makai side of the road?

A. I was able to, yes. Only the second lane I could see.

Q. You could see nothing as far as the first lane is concerned?

A. No, sir, because the cars were moving. There wasn't enough gap to see the first lane or into the intersection itself.

Q. But you could see the second lane?

A. Yes, sir.”

(Tr. 283.)

#### **4. It Was Prejudicial Error to Deny Motion for New Trial After Improper Communications With the Jury Were Shown.**

These improper communications were testified to by the Bailiff during the arguments for Motion for New Trial, as having taken place between Mr. Humphreys, foreman of the jury, and the Bailiff. (Testimony of the Bailiff):

“Q. Did any of the jurors pose any questions to you as to the possible effect of their failure to agree on a verdict?

A. There were a number of questions posed to me by a number of jurors. One Jurior, specifically Mr. Humphrey, did ask me a question,



the substance of which was, what would happen if the jury were unable to reach a verdict? And I don't believe he used the word 'verdict'. That is my interpretation, my words, my interpretation of the question.

Q. And what did you respond?

A. I responded that if there were no decision, it would be up to the parties to decide what they were going to do at that point.

Q. Did you have any further conversations with him at that time?

A. On that question, no.

Q. Did he ask you any other question?

A. Yes, he did.

Q. What else did he ask you?

A. He asked me who paid the cost of the litigation generally. And I asked him what he meant by costs of litigation. Once again I should point out that he may not have said 'cost of litigation' but I interpreted that in his words as 'cost of litigation'. And I responded by asking him what did he mean by cost of litigation, at which point he said, 'I mean the cost of the Court, Court staff and other costs incurred by the parties.' I said that there were no costs which resulted from the presence of the Judge, the use of the courtroom, the Judge's staff, and any other costs which may be incurred would be incurred by the parties themselves.

Q. Was there any other further conversation in connection with this particular conversation?

A. Yes, there was one additional question which was to the effect of what would happen if one of the parties were a litigant, to which I responded—excuse me—I don't recall if I stated recollection of the question asked. As I recall the

question now, it was, if one of the parties to the litigation were an insurance company, and I responded that they would be treated the same way as any other.

Q. Was there any other further conversation?

A. At that time there was no further conversation with Mr. Humphrey, no. There was no further conversation and we passed on to saying that we have to hurry, it is raining, something to that effect. There was no further conversation than otherwise previously discussed.

Q. What was the last question, what would happen if one of the parties was an insurance company?

A. Yes.

Q. Did anyone else take any part in this conversation just described with Mr. Humphrey?

A. It was only Mr. Humphrey."

(Motion-Tr. Add. 8-10.)

**5. It Was Prejudicial Error to Deny Motion for New Trial After a Verdict Not Supported by the Evidence.**

The evidence admitted by the Plaintiff as to his own negligence, should have prevented recovery as contributory negligence as a matter of law, regardless of any negligence on Defendant's part.

The Plaintiff's testimony on cross-examination, as to the matter of speed:

"Q. I am trying to find out, Mr. Chai, where it was that you made this observation of 32 miles per hour relative to when you first entered the third lane.

A. I made the observation while I was traveling there, looking down, where I was.

Q. And you have no idea how far you had traveled down the third lane when you first made that observation?

A. No, sir.

Q. Would you say that you were more than halfway the distance from where you entered into the lane to Lipoa Street when you made that observation?

Mr. O'Connor: Your Honor, I object to the question. The witness testified he didn't know where he was.

The Court: Objection overruled.

A. I don't know, sir."

(Tr. 257-258.)

The Plaintiff's testimony on cross-examination, as to the matter of watching out for other traffic:

Q. You understand that we are talking now about the cars in Lane No. 2 beyond the intersection of Lipoa Street.

A. Yes, I do.

Q. And what were those cars doing?

A. They were stopped.

Q. Were they at a complete stop?

A. I saw the brake lights on. I know they were stopping again.

Q. How far were you from the corner of Lipoa Street when you saw the brake lights were on and you knew they were stopping?

A. I don't really know, sir.

Q. You have no idea?

A. No, sir."

(Tr. 281.)

The Plaintiff's testimony again on cross-examination, on the matter of other traffic:

"Q. (By Mr. Gould): Mr. Chai, can you give us any estimate at all how far you were from the intersection of Lipoa Street and Kam Highway when you observed vehicle 'CC-2' at a stop?

A. Mostly because, while I was traveling as fast as I saw that car stopped, the area of 'CC-1', in other words, is when I had the impact with Mrs. Hymer. I cannot say when.

Q. Did you see 'CC-2', before you saw 'CC-1'?

A. Yes.

Q. And when you saw 'CC-2', this was already stopped?

A. I saw the car. I cannot describe the car. There are various cars. When I came down, I saw the crossing there. Everybody was stopping. That car stopped. And I was practically on 'CC-1' then when I realized——"

(Tr. 299.)

Additional testimony was presented by the Witness Lawrence on the speed of the Plaintiff:

"Q. (By Mr. Gould): Did that same sound that you heard initially, as you indicated, was a roar of acceleration, did that same sound continue all the way up the lane until the point of impact?

Mr. O'Connor: I object. There is no proper foundation.

The Court: Objection overruled.

Mr. Gould: Would you answer that, please?

A. Yes, sir."

(Tr. 149.)

And Mr. Lawrence's testimony on the speed at the time of impact:

"Q. (By Mr. Gould): And what speed did you estimate him to be traveling at the time of the accident?

A. Between 30 and 40.

Q. Mr. Lawrence, you have already testified, have you not, that when I met with you in your home we discussed this accident with you, on February 17, 1967?

A. Yes, sir.

Q. It was last Friday?

A. Yes, sir.

Q. Did you tell me at that time——

Mr. O'Connor: I am going to object to this modus operandi on the part of Counsel for impeaching the witness. He had two long conversations evidently with the witness, and he is using some brief moments during one of them in order to impeach.

The Court: Counsel, you assume facts that I don't know about—how long it was. I don't know whether it was a long conversation. The objection is overruled. Go ahead with your question. Let's hear the question.

Mr. Gould: Thank you.

The Court: On the 17th was it? Which one?

Mr. Gould: The 17th, Your Honor.

The Court: All right.

Q. (By Mr. Gould): Did you tell me that it was your opinion that the speed that he attained at the time of the accident was 40 to 45 miles per hour?

A. Not more than 45, and not less than 30 at that time I told you.



Q. And on February 13, 1967, that was the time before when I was at your home, did you tell me at that time that it was your best estimate that it was between 40 and 45 miles an hour?

A. Not more than 45, not less than 30; 40 to 45, it could be. It depends on the motorcycle."

(Tr. 153-154.)

**6. It Was Error for the Court to Deny Motion for Mistrial After Plaintiff's Counsel Questioned Defendant As to a Possible Criminal Conviction for Traffic Violation in the Presence of the Jury.**

The question was presented on the incident from which this civil action arose. (Mr. O'Connor's examination of the Defendant):

"Q. Mrs. Hymer, were you convicted of an offense arising out of this accident, namely, a violation of the right of way on a left turn, un-signalized change in an intersection?

Mr. Gould: If the Court please, I will object on the grounds that it is irrelevant, immaterial, and highly prejudicial.

Mr. O'Connor: May we approach the bench?

The Court: Approach the bench.

(A conference was held at the bench between Court and Counsel, in which the following occurred):

The Court: What is your offer of proof?

Mr. O'Connor: My offer of proof is that the answer to this question would be that Mrs. Hymer was convicted for such an offense.

The Court: Spell it out. From a trial or plea of guilty or what?

Mr. O'Connor: She went down to the Pearl City Traffic Court, pleaded No Contest, and was found guilty by the Judge.

The Court: As it stands like that, plea or Nolo, guilty as charged, that is the way it is? Go ahead.

Mr. O'Connor: Section 222-22 which reads—  
'Discrediting witnesses by proof of conviction. A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.'

The Court: We all recognize on the old basis in order to avoid the stigma of a conviction on a criminal matter, the pleading of a No Contest, not for the purpose of admitting that they were guilty of the charge but simply saying, 'I am not going to fight it.' But the ordinary rule is that Nolo is not evidence of a conviction, for the purpose intended, for an admission of guilt or conviction of guilt. It is simply used to dispose of the case and is not a conviction within the terminology of a case for impeachment of the individual. The whole basis behind it is to show that it will not show a conviction when in a civil matter.

Mr. Gould: We have the rationale——

The Court: Let me see it. (Mr. Gould hands a document to the Court.) Have you got anything else?

Mr. Gould: Well, at this time we are going to ask for a mistrial.

The Court: I am not going to give you a mistrial. I will tell the jury what it is all about. Then you can move for a mistrial, if you want to.

Mr. Gould: That is not exactly in point, but it shows the rationale of not allowing a convic-



tion to be stated, a conviction on the same traffic charge which is involved in this case." (Referring to a citation in a book.)

(Conference at the bench was concluded at this point.)

"The Court: The objection to the last question is sustained.

Ladies and gentlemen of the jury, I can tell you that the mere fact that a question is asked regarding a conviction, and so forth, and the objection to that is sustained, that you cannot presume from that that she was convicted or wasn't convicted. The matter of the present status is that the objection is sustained and you will ignore the question and all the implications which might arise in the question itself.

Mr. Gould: Your Honor, may I renew my motion at this time?

The Court: The motion is denied."

(Tr. 51-54.)

**7. It Was Prejudicial Error for the Court to Fail to Control Final Arguments of Counsel Within Boundaries Recognized At Law.**

Plaintiff's counsel implied that experts were available but not called, without foundation in the evidence in the case that such experts exist. (The official transcript is in error on this passage regarding identities of the speakers; corrected identities are shown in brackets):

"The Court [Mr. O'Connor]: I have already been through that with you. You can make your own vector analysis if you want to, as I did. And you noticed that Mr. Gould slipped over this very nicely to you in his argument. Consider the facts

of the accident, and you can consider the damage to the car. Let me tell you how much you can consider the damage to the car. You can wax emotional but Mr. Gould said that the hood was torn and the fender was dented. But we have no evidence in this case by anyone who is an expert, that this damage indicates anything more than a 30-mile an hour motorcycle hitting an automobile, and no expert sat on that witness stand and said anything to you in that regard. It was your position, as testified to you by Mr. Chai, that he was going 32 miles an hour. Mr. Gould took such tremendous issue with that. And why didn't you present an expert in this courtroom who would have given you an estimate in speed?

Mr. O'Connor [Mr. Gould]: If the Court please, that is purely speculative, getting into an area in which there may or may not be experts. There was no evidence to that—

The Court: Counsel, I will allow this to go so far—you have four minutes left."

(Argument—Tr. Add. 75-76.)

Plaintiff's counsel misstated the law to the jury, over Defendant's objections (Argument of Mr. O'Connor):

"You know in your own driving that a person who has the right of way, if he says, well, I have got the right of way but I can go ahead and do anything I want because if we get into an accident, if I get into an accident with a person who doesn't have the right of way—or vice versa, if the person who didn't have the right of way said that he could do anything he wanted to do any time and if he gets into an accident it will be

equally the fault of both persons, even if the other person is exercising his right of way—wouldn't we be in a heck of a mess in a situation like that? The person who has the right of way has the privilege of exercising it. And I believe that the Court is going to instruct you that the right of way is the privilege of immediate priority in the use of the roadway. In this case, Benjamin Chai had the privilege to utilize that roadway at a speed which was reasonable under the circumstance. And here are the provisions which apply to Benjamin Chai:

‘Section 15-7.2. Speed limit zones.

No person shall drive a vehicle on a public highway or street at the speed in excess of the following speed limit zones established or hereafter established therefor by ordinance of the City Council.

Thirty-five miles per hour.

(a) On those streets or portions thereof described . . . .’

And this includes Kam Highway between Pearl City and Aiea. And 35 miles per hour.

‘Section 15-7.3. Speed limit signs.

The speed restrictions set forth in Section 15-7.2 . . . .’ . . . and that is the 35 miles an hour . . . ‘. . . on roadways, streets, highways or boulevards, or portions thereof, shall be ineffective unless legible signs are erected and maintained indicating the maximum speed permissible thereon.’

There was a sign on this highway that said 35 miles an hour. There was no sign which said, under certain conditions the speed is reduced to

25. There was no sign that had those blinking lights that reduced the speed because of traffic. There was no sign that said——

Mr. Gould: If the Court please, I am awfully reluctant to interrupt again but counsel is attempting to testify that Mr. Chai is not susceptible to all the ordinances. He said this ordinance is applicable to Mr. Chai——

The Court: The jury will understand that counsel is arguing. The objection made by Mr. Gould as to Mr. O'Connor is the argument. And, ladies and gentlemen of the jury, this is argument and I will read to you what the ordinance says. Mr. O'Connor you may continue."

(Argument—Tr. Add. 72-74.)

**8. The Court Erred in Refusing Requested Instruction on the Law Regarding Exercise of Right of Way.**

The proffered instruction, Defendant's number 18 (R. 62):

"You are hereby instructed that a right of way is not absolute but at all times relative and subject to the fundmanetal doctrine that a party shall exercise the right so as to avoid injury to himself and others."

was denied after discussion in chambers:

"Mr. Gould: Mossman v. Sherman, 34 Hawaii.

The Court: I will take a look at it right now.

Mr. Gould: Page 41.

The Court: 41?

Mr. Gould: No. 481.

The Court: What do you say, Mr. O'Connor?

Mr. O'Connor. I would object to it.

The Court: On what grounds?

Mr. O'Connor: On the grounds that it is completely out of context and not applicable to the case. You are already saying that the violation of an ordinance is evidence of negligence, period. And this simply takes a statement in a case in which you have an entering intersection situation, a set of facts to which that law is made applicable and facts which are different from the facts here. And all he is trying to do is to take a section from that case and make an instruction out of it. And I don't think this instruction necessarily is applicable to the case at hand.

Mr. Gould: Except, Your Honor, that I have a feeling that in this particular area many, many people feel they have an absolute right of way. And I believe in fairness to the defendant, particularly in view of that case, certainly the fundamental law is clear as to the right of way, that it is not an absolute right of way. It still has to be exercised with caution. I think that is the way you read it substantially.

The Court: That is what they did in the McCombs case which was cited in Mossman v. Sherman. It was the joker and the case supporting that was a two-car intersection case. Each one said, I had the right of way. And the Sherman case says that the operator of the other vehicle was given the right of way, and that the right of way can be exercised, and so forth. The McCombs case was exactly the same thing where two of them had the right of way and came at right angles and where it became an issue of fact for a jury to determine. And, quoting from the case,

'The mere fact that the operator of a motor vehicle reaches an intersection prior to the entry of another automobile therein does not in



and of itself give such operator the right to proceed across the intersection in any event; and where it becomes an issue of fact for a jury to determine whether or not in approaching or proceeding across an intersecting highway the operator of the motor vehicle first reaching or entering upon the intersection, in the exercise of due care, might have avoided a collision and resultant injuries, and instruction to the effect that irrespective of the existing conditions such operator has a right to proceed across the intersection is erroneous.'

They are pulling back from the Mossman case. 'Under the defendant's testimony, the jury might reasonably find that approaching car, that his failure to take any measures before the collision . . . '—that his failure to do so was negligence.

The approaching car was 25 feet away. Now, you don't have that here. Neither said that they were aware of the other until they sensed it. However, I feel that this is innocuous enough and it is fundamental for a party to so exercise his right of way. It work both ways.

Mr. O'Connor: No, it doesn't work both ways.

The Court: Why not?

Mr. O'Connor: Because my client had the right of way. And the situation is not the same.

The Court: I will agree.

Mr. O'Connor: And if this instruction is given, it opens a whole door which should not be there, because it is not a situation where some party saw another party, and for some great distance, and he would, oh, I am going to go ahead anyway because I have the right of way. This is a situation where a right of way should have been determined prior to the entrance of the place

where the accident took place. And there was no ability for one car to see another all the way across.

The Court: I am not going to give it. I have decided. It is not a *Mossman v. Sherman* case here. I don't think it is applicable. So it is refused. I feel that the other instructions will cover the whole picture. I feel that the instruction I have on the ordinance covers this. What do you think?

Mr. O'Connor: I think this is an incorrect statement of the law based on *Young v. H.C. & D.*

The Court: I feel that *Young v. H.C. & D.* goes into this, and it is a better statement of the law. What do you want to do? Why do you feel it is necessary?

Mr. Gould: We feel it is necessary, Your Honor, because the instructions you gave, the instruction as you gave it, makes the finding of a violation of the statute negligence is obligatory. And this thing makes it optional with the jury. And it leaves the finding of fact in the hands of the jury rather than the Court. And this is almost a peremptory instruction of the Court, telling them that if they find a violation of the ordinance, they have got to find negligence. It is misleading. And this particular instruction puts the ordinance into a proper light.

The Court: While a violation of an ordinance is not necessary negligence, that portion is misleading.

Mr. O'Connor: It is just not true.

Mr. Gould: As a matter of law?

The Court: The violation of an ordinance is negligence——."

(Tr. 532-536.)



Objection was restated in open court:

“Mr. Gould: If the Court please, the defendant objects to the failure of the Court to give requested instructions and objects to the giving of instructions as objected to and for the reasons previously given in Chambers therefor.

The Court: The same is incorporated in the record as if they were made at this time.”

(Tr. 581.)

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### SUMMARY OF ARGUMENT

1. **The Trial Court Erred in Allowing the Loss of Consortium Claim on Plaintiff's Wife to Proceed to Judgment.**
  - (a) The claim prayed for by Plaintiff, Victoria Chai, on the face of the pleadings, \$7,500, was less than the jurisdictional minimum.
  - (b) The Plaintiff, Victoria Chai's claim cannot be aggregated with that of Plaintiff, Benjamin Chai, to reach the jurisdictional minimum.
  - (c) The Plaintiff, Victoria Chai, has no cause of action for which relief may be granted, since in the absence of statute, the majority common law position is that a wife is not entitled to recover for loss of consortium due to injury to the husband.
  - (d) Hawaii has no statute granting the wife such relief.

**2. It Was Prejudicial Error to Exclude Evidence Offered to Show the Plaintiff's Prior Manner of Driving.**

- (a) Defendant's position is that Plaintiff was guilty of contributory negligence, or assumed the risk, in attempting to travel through a crowded, slow intersection at or near the posted maximum speed limit.
- (b) The proffered evidence, rejected by the trial court, was directly relevant to the issue of contributory negligence, and material to the issue of assumption of risk.
- (c) There is ample authority for the admission of such evidence.
- (d) To deny the jury the right to raise reasonable inferences of state of mind, attitude and credibility of the Plaintiff was prejudicial to the Defendant's cause.

**3. Trial Court Erred in Excluding Portion of Deposition Where Said Portion Related to Plaintiff's Awareness of Traffic and Credibility As a Witness.**

- (a) Plaintiff's visibility in the intersection was essential to the issue of contributory negligence.
- (b) Plaintiff's deposition contained inconsistencies with his testimony at trial on this issue.
- (c) Trial court erroneously excluded this portion of the deposition from reading at trial, by State rules of evidence.

(d) Trial court intruded in the province of the jury in determining the weight to be given to answers to questions understood when asked.

**4. It Was Prejudicial Error to Deny the Defendant's Motion for New Trial, After Improper Communications With the Jury Were Shown.**

(a) Questions were asked by the jury Forman, of the Bailiff and answered by the Bailiff, which were material to the ability of the jury to reach a verdict, at a time when, by the nature of the questions, it appears the jury was deadlocked.

(b) A verdict so tainted should be held to be void, absent an affirmative showing of no effect on the outcome of the verdict.

**5. It Was Prejudicial Error for the Trial Court to Deny Defendant's Motion for New Trial When the Verdict Was Not Supported by the Evidence.**

(a) Plaintiff's admissions during trial were sufficient to establish contributory negligence as a matter of law.

(b) There is ample Hawaiian authority to support a finding of contributory negligence as a matter of law.

(c) There was insufficient evidence to support a jury verdict of negligence of the Defendant.

(d) New trial should be granted when a verdict is rendered which is not supported in law under the facts shown.

**6. The Trial Court Erred in Denying the Defendant's Motion for Mistrial After Plaintiff's Counsel Improperly Questioned Defendant As to a Criminal Conviction for Traffic Violation Arising From the Same Facts As Then Before the Jury.**

- (a) By the majority rule, questions as to criminal convictions are inadmissible as immaterial and highly prejudicial.
- (b) The Hawaii law allowing such questions applies only to convictions for purposes of discrediting a witness.
- (c) The Defendant had not been convicted, as Plaintiff's counsel was aware, of a criminal offense since a plea of nolo contendere had been entered and accepted.
- (d) The question was not placed for the purpose of discrediting the witness but to create a prejudicial inference in the minds of the jurors.
- (e) After the question was heard by the jury, the highly prejudicial inference created was beyond the ability of the court to cure by instruction.

**7. It Was Prejudicial Error for the Trial Court to Fail to Control the Final Arguments of Plaintiff's Counsel Within Boundaries Recognized At Law.**

- (a) Plaintiff's counsel called attention to the failure of Defendant to call certain types of expert witnesses, when no such experts were called by the Plaintiffs, or shown to exist.
- (b) Plaintiffs' counsel argued law to the jury in final argument, misstating the Hawaii law of right-of-way.

**8. The Trial Court Erred in Refusing the Defendant's Requested Instruction on the Hawaii Law of Exercise of Right-of-Way.**

- (a) The requested instruction was essential to the issue of right-of-way in connection with contributory negligence and assumption of risk.
- (b) The requested instruction was accurate, applicable and relevant to the issues presented.
- (c) Refusal to give the instruction denied the Defendant a fair consideration of her cause and constituted reversible error.

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**ARGUMENT**

**1. ERROR IN ALLOWING THE LOSS OF CONSORTIUM CLAIM OF THE DEFENDANT'S WIFE.**

The claim prayed for by the Plaintiff, Victoria Chai, was by the face of the pleadings \$7,500, and less than the jurisdictional amount. Where, by the face of the pleadings, the Plaintiff cannot recover the jurisdictional minimum, jurisdiction should be denied. *Otis Elevator Co. v. Seale*, 334 F.2d 928 (1964); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 282, 82 L.Ed. 845 (1938).

Moreover, the claim of the Plaintiff Victoria Chai cannot be aggregated with the claim of her husband, Plaintiff Benjamin Chai to reach the jurisdictional minimum. In *Eagle Star Insurance Co. v. Maltes* (CA 5 1963) 313 F.2d 778, the Court held:

“To aggregate claims of several Plaintiffs, the Plaintiffs must have a ‘common and undivided



interest' though it may be separable as between themselves. 'But where their interests are distinct and their only relationship is that they form a class of parties whose rights or liabilities arise out of the same transaction, or have a relation to a common fund or mass of property sought to be administered, such distinct claims or liabilities cannot be aggregated.' *Clay v. Field*, 138 U.S. 464, 11 S.Ct. 419, 34 L.Ed. 1044 (1891)." See *Alvarez v. Pan American Life Ins. Co.* (CA 5 1967) 375 F.2d 992, *Louf v. Nelson* (Mont. 1965) 246 F.Supp. 307.

In *Coffman v. City of Wichita* (Kans. 1958), 165 F.Supp. 765, the Court dismissed because individual plaintiffs failed to meet jurisdictional requirements, citing *Aetna Ins. Co. v. Chicago R. I. & P. R. Co.*, (CA 10 1956) 229 F.2d 584, 586. In *Bounougias v. Peters* (CA 7 1966), 369 F.2d 247, ancillary jurisdiction was denied where claims were based on different facts, again citing *Aetna, supra*.

Here, by the pleadings and the evidence, the claims of the Plaintiffs, Victoria and Benjamin Chai, are based on different facts, since Victoria Chai's claim is based on loss of services, companionship, etc. Although common in an interest in the controversy "they are not individual in the sense that they constitute in a totality an integrated right," *Aetna, supra*, in that the claim of Mrs. Chai could fail while that of Mr. Chai could be sustained without reaching inconsistent results.

Further, the Plaintiff, Victoria Chai, failed in the pleadings, or in the proofs, to found a claim for which relief may be granted.

“In the absence of statute, a wife has no cause of action for any loss sustained by her, including loss of consortium in consequences of personal injuries inflicted on the husband.” 41 CJS Husband and Wife Section 404, cited in *Potter v. Schafter*, 161 Me. 340, 211 A.2d 891, 892; *Page v. Winter*, 240 S.C. 516, 126 S.E.2d 570; *Rush v. Great American Ins. Co.*, 213 Tenn. 506, 376 S.W.2d 454, 455.

In *Werthan Bag Corp. v. Agnew* (CA 6 1953) 202 F.2d 119, the Court held:

“It is well established that the right to recover for loss of consortium which a wife has in certain circumstances where her common law disabilities have been removed (such as an action for alienation of the husband’s affections or in actions against persons unlawfully selling him deleterious drugs) does not extend to a case in which this right has been indirectly interfered with by negligent injury to the husband. The wife is held to have no cause of action for such injury.” See *Criqui v. Blaw-Knox Corp.* (CA 10 1963—Kans.) 318 F.2d 811, following and citing *Werthan Bag Corp., supra*.

In *Carey v. Foster* (CA 4 1965—Va.) 345 F.2d 772, the Court surveyed American jurisdictions and found that a wife’s claim for consortium was not allowed in: Ala., Ariz., Colo., Fla., Ind., Kans., Md., Minn., Ky., N. J., N. M., N. Y., Okla., Pa., S. C., Tenn., Tex., Wash., W. Va., and Wisc. 345 F.2d 777 n. 5.



## 2. PREJUDICIAL ERROR TO EXCLUDE EVIDENCE OF PRIOR MANNER OF DRIVING.

It is the Defendant's position in this cause that the Plaintiff was guilty of contributory negligence, or assumed the risk when he attempted to cross through the intersection where the accident occurred at or near the maximum posted speed limit in crowded traffic which was at a standstill or at a stop. The Defendant's offer of proof as to evidence of the manner of prior driving, included evidence that the Plaintiff had, for several miles, moved from lane to lane at high speeds, during which the Plaintiff may have illegally passed a police officer, who was, at the time of the accident, wanting to catch up to the Plaintiff in order to ticket him. This evidence was not offered to show a violation of the law, but merely to show the circumstances from which the jury might reasonably infer what the Plaintiff's demeanor was at the time of the accident.

“Testimony as to the manner at the time prior to and at a place before reaching the scene of an accident is often admitted to corroborate evidence that the vehicle was operated in the same manner at the place where the accident occurred, even though the remote evidence standing alone would not be legally relevant. (Citations omitted.) Likewise testimony of a third person concerning the manner in which a party to the accident was driving at some point before he reached the scene of the accident, may be admitted to refute the parties' testimony as to the manner in which he was driving. (Citations omitted.) In cases where recklessness, wantonness, or willfulness are in

issue it is frequently necessary, or desirable in order to establish a strong case to show not only the indifference to consequences at the time the accident occurred, but also a state of mind such as heedlessness or willfulness that persisted for several minutes prior to the accident. Where such a mental attitude is important in a case the Court may well admit evidence concerning the manner or driving a substantial time before or distance from the accident." 46 ALR 2d 21.

The evidence offered was both relevant and material to the issue of Plaintiff's conduct at the time of the accident and his state of mind immediately prior to the accident which bear on the issue of contributory negligence and to assuming the risk. In addition, it was material as to the credibility of the Plaintiff's testimony. In *Comins v. Scrivener* (CA 10 1954), 214 F.2d 810, 46 ALR 2d 1, the Court held:

"The testimony given by the witness . . . did not merely show the speed at which Plaintiff was travelling at the point 3, 5, or 10 miles from the point of the accident, in addition it showed circumstances from which the jury could reasonably infer that after the Plaintiff passed the witness, he continued to travel at an excessive and dangerous rate of speed up to the point of the accident. It showed circumstances from which the jury could reasonably predicate the deduction that Plaintiff's dangerous rate of speed in excess of that permitted by the law of the State continued up to the point of the accident. The testimony was admissible as tending to show the speed at which the Plaintiff was travelling when he passed the witness and also tending to show the circum-

stances from which it could be inferred that such speed continued up to the point of the accident." *Comins v. Scrivener, supra*, cited in *Brower v. Quick* (Iowa 1958), 88 N.W.2d 120, 127.

The offered evidence would have been received, limited to the reasonable inferences that the jury might draw with respect to state of mind, heedlessness, and credibility of the Plaintiff's testimony, as they effect the issues of the contributory negligence and assumption of risk at the time of the accident. Failure to admit this evidence constituted reversible error. *Wagnon v. Porchia* (1962), 235 Ark. 731, 361 S.W.2d 749; *Lovejoy v. Tidwell*, 212 Ga. 750 (1956); both citing *Comins v. Scrivener, supra*.

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**3. TRIAL COURT ERRED IN EXCLUDING PORTION OF DEPOSITION, WHERE SAID PORTION RELATED TO PLAINTIFF'S AWARENESS OF TRAFFIC AND CREDIBILITY AS A WITNESS.**

The deposition of the Plaintiff, Benjamin Chai, in the testimony later excluded by the trial court, indicated that the Plaintiff understood the questions concerning visibility into the intersection where the accident occurred, particularly with respect to the superposition of Kamehameha Highway's two Honolulu-Bound through lanes, and Lipoa Street. Since these two lanes of traffic were in the direction from which Defendant approached, (the Plaintiff's left), ability of the Plaintiff to see this area was relevant to the issue of contributory negligence.

Given the admission in the deposition, ie., that the Plaintiff could not see into the intersection, the jury could have reasonably inferred contributory negligence to the Plaintiff by his act of proceeding into a "blind" intersection at his admitted speed of 32 mph. However, if he could see into the intersection to his left, as he testified at trial, the question is raised as to why he did not see the Defendant's automobile approaching. In either case, the Plaintiff's testimony in this sensitive area should have been subject to the further scrutiny of the jury in the light of Plaintiff's prior admissions.

Although it is conceded that the trial court has great discretion in admissibility of evidence, the degree of intelligibility of the questions in the deposition must be interpreted, not in the light of the transcript alone, but in reference to a diagram, Defendant's Exhibit "E" (Tr. 302), prepared during the deposing, by the Plaintiff. This diagram was available to the jury during the Plaintiff's testimony (Tr. 302 et seq.) so that the questions referring to "area" or "portions" of the intersection in the deposition could have been explained in terms of Exhibit "E", and the conflict in the Plaintiff's testimony brought before the jury.

The Plaintiff's testimony on his understanding of the intersection is also in conflict with his deposition. In his answer in the deposition, excluded by the Court, he indicated he could not see a portion of the intersection "and it's a pretty wide intersection there" (R. Dep. of Chai 33). At trial, presented with the same diagram, the Plaintiff purported not to



understand which area of the intersection was referred to by the questions (Tr. 304 et seq.). However, the Plaintiff had testified earlier that he could see nothing of the first lane of traffic in these words: "No, sir, because the cars were moving. There wasn't enough gap to see the first lane *or into the intersection itself*" (Tr. 283) [Emphasis added]. It is apparent that the "intersection" referred to is inconsistent with the "pretty wide intersection" not visible "because I am looking ahead", described by the Plaintiff's deposition in the excluded portion (R. Dep. of Chai 33).

The conflict thus presented was relevant to the credibility of the witness, and factual evidence of Plaintiff's visibility and awareness, and should have been admitted. Rule 26(d)(2) F.R.C.P.

Further, the standard to be applied on the admissibility of evidence is that of the courts of general jurisdiction of the State in which the United States Court is held, *which is most favorable to the reception of evidence*. *Cordle v. Allied Chemical Corp.* (CA 6 1962), 309 F.2d 821. In the instant case, the Hawaii law as pronounced in *Cozine v. Hawaiian Catamaran, Ltd.*, 49 Haw. 77, 412 P.2d 669 (1966), reh.den. 49 Haw. 267, 414 P.2d 428 (1966) should apply. In that case, the Court reversed where the trial court had refused to allow cross-examination of the plaintiff on the contents of an affidavit, holding that:

"We first direct our attention to the right of defendant to cross-examine on the subject of this affidavit. Even apart from the fact that this witness was the plaintiff in the case, she could as

a witness be cross-examined as to specific acts affecting her credibility. *Republic v. Luning*, 11 Haw. 390; *Territory v. Buick*, 27 Haw. 28, 46. Such cross-examination rests in the discretion of the court, and is reviewable only for abuse of discretion, but we find an abuse of discretion here. *The witness being the plaintiff and the affidavit having been made in this very case, it was error not to permit cross-examination as to the truth of the statements made in the affidavit.*" 49 Haw. 101. [Emphasis added.]

Thus, where a deposition was made by an adverse party, and the questions later excluded were understood and answered, it was an invasion of the province of the jury for the trial court to rule the questions unintelligible, when it would appear that the questions were understandable to the deponent since they were asked and answered without objection. The degree of intelligibility of the testimony should have been a question for the jury going to the weight of the evidence.

"The jury is the sole judge of the credibility of the witnesses and the weight of the evidence."  
*State v. Carvelo*, 45 Haw. 16, 33.

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#### 4. IT WAS PREJUDICIAL ERROR TO DENY NEW TRIAL AFTER IMPROPER COMMUNICATIONS WITH THE JURY.

In the instant case, the trial court ruled that although the admittedly improper communications between the Baliff and the Jury Foreman did take place, that there was not grounds for a new trial,



because the communications did not affect the merits of the case; however, it is contended that they did in fact affect the outcome because they took place at the time when, by the nature of the communications themselves, it was presumable that the jury had reached a deadlock. All of the questions asked of the Bailiff by the Jury Foreman were dealing with the consequences if the jury were unable to reach a verdict, to wit: what would the parties do next if no verdict were reached; where the cost would lie in that situation; and what would be the consequences if one of the parties were an insurance company. Although none of the questions were relevant to issues of fact before the jury, the implications are clear. In *Kavanaugh v. Quigley*, 63 N.J.Super. 153, 164 A.2d 179 (1960), wherein the Bailiff violated his oath by communicating with the jury while impaneled, a motion for new trial after verdict was denied by the trial court, the denial being reversed on appeal. In so holding the Court said,

“But if the record fails to show whether or not the irregularities were prejudicial as in the case here, it is presumed to be so and to be cause for reversal. It is only when the irregularity is affirmatively shown to have had no tendency to influence the verdict, that reversal is not required.”

The Court continued:

“However, the overriding consideration is firmly established public policy that a new trial should be granted or refused, ‘with a view, not so much to the attainment of exact justice in the particular case, as to the ultimate effect of the decision

upon the administration of justice in general.' (citations omitted.) Apart from the question of prejudice, we think that in the service of this policy, the Court can ill afford to rationalize illegal conduct which is not only an affront to the dignity of the Court, but in addition, removes the trial judge from his control of the case." (*Kavanaugh v. Quigley, supra*, 184.)

Thus, in the instant case, the verdict of the jury has been tainted and the inference is raised that the communication with the Bailiff dealing with where the costs would lie for a new trial and what would happen if the jury failed to reach a verdict, while not dealing directly with the issues of the case, was material to the ability of the jury to reach a verdict and that in such circumstances the decision should be reversed and new trial had to remove the cloud from the present verdict.

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**5. IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR NEW TRIAL WHEN THE VERDICT WAS NOT SUPPORTED BY THE EVIDENCE.**

Contributory negligence should have been found against the Plaintiff in this case as a matter of law. Plaintiff's admissions in open court, which must be taken as facts when against Plaintiff's interest, should be sufficient to support a finding of contributory negligence as the only reasonable inference. First, Plaintiff admitted to maintaining a high rate of speed, just below the maximum posted limit for ideal conditions, until impact occurred, under traffic conditions he him-

self described as heavy, stop and go. Secondly, the Plaintiff admitted that he approached an intersection where, he again admitted, traffic was slowing and stopping, without being able to see into the intersection, at the same high rate of speed. Thirdly, Plaintiff admitted that he did not notice that traffic had come to a complete stop in the adjoining left hand lane, until he was one car length from the intersection where impact occurred, while it cannot be disputed that this traffic must have been stopped for at least the length of time required for the Defendant's automobile to transit the adjoining lane. Finally, it cannot be disputed that the Plaintiff's speed directly contributed to the extent of his injuries. In *Young v. Price*, 47 Haw. 309, 388 P.2d 203 (1963), the Court held:

“Further where the facts are disputed and reasonable men might differ on the facts or the inferences which may be reasonably drawn from the facts, the question of negligence is left to the jury under proper instructions; but where there is no conflict from the evidence and but one inference can be drawn from the facts, it is the duty of the court to pass upon the question of negligence and proximate cause as questions of law. *Carreira v. Territory*, 40 Haw. 513, 517. This is equally true where contributory negligence is the issue. *Ferrage v. Honolulu Rapid Transit*, 24 Haw. 87, 91.” 47 Haw. 313.

There is ample Hawaiian authority to support a finding of contributory negligence as a matter of law. In *Ferrage v. Honolulu R. T. & L. Co.*, 24 Haw. 87 (1917), the Court held:

“Questions of negligence, contributory negligence and proximate cause are usually for the jury to determine, but where the facts are undisputed and but one reasonable influence can be drawn from them it is the duty of the court to pass on them as questions of law. 29 Cyc. 630, *Desky v. Lack*, 11 Haw. 395, *Fuller v. Honolulu R. T. & L. Co.*, 16 Haw. 1, 11, *Dong Chong v. Honolulu R. T. & L. Co.*, 16 Haw. 272. The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. *Brommer v. Pennsylvania R. Co.*, 179 F. 577, *Gregory v. Slaughter*, 8 LRA (NS)(Ky.) 1228, *Weidner v. Otter*, 188 S.W. (Ky.) 335, *Rupp v. Keebler*, 175 Ill. App. 619, *Geiselman v. Schmidt*, 106 Md. 580, 585, *Lauson v. Fond du Lac*, 141 Wisc. 57, 60.

The evidence clearly showed that the plaintiff approached this street intersection at an excessive rate of speed, and without attempting to slow down until the street car came into view, so that it was impossible for him to either stop or turn his car so as to avert the collision. That was negligence as a matter of law and the jury could not have said that it did not contribute to the injury.” 24 Haw. 87, 91-92.

Furthermore, the question of credibility of the Plaintiff's statements is raised by the testimony of the Witness Lawrence, who testified that he could hear the Plaintiff's motorcycle accelerating all the way down the lane until impact occurred. Discrepancies also appear in the Plaintiff's own testimony as to when and where he determined his speed.



In addition, there was no substantial evidence presented at trial which could support negligence to the Defendant. Allegations were made that Defendant usurped Plaintiff's right of way, but no evidence was presented on this question by the Plaintiff, except an inference raised by an improper question placed to the Defendant, but not answered, before the jury (see Argument 6 herein).

By the Plaintiff's own admission, he did not see the Defendant's automobile until the instant just before impact. It follows, therefore, that visual obstructions between the parties prevented Defendant from seeing; by the Plaintiff's theory of the case. Defendant should not, therefore, be held to a higher standard of care than Plaintiff.

It is apparent that whether or not Defendant usurped the right of way, Plaintiff was bound to exercise his right of way with due care to avoid collisions. *Mossman v. Sherman*, 34 Haw. 477 (1938). Thus the same set of facts, the occurrence of a collision in the intersection, are as probative of the Plaintiff's contributory negligence as they are of the Defendant's negligence, to wit: that each owed the other a duty of reasonable care to avoid collision. For every inference that can be raised as to the negligence of the Defendant, there is a coequal inference of contributory negligence against the Plaintiff under the facts admitted by the Plaintiff.

Where the evidence, as here, fails to support a verdict of the jury, a new trial should be granted. *Yo-*

*shioka v. Shiroki*, 29 Haw. 459 (1926); *Re Heeb's Estate*, 26 Haw. 538 (1922); *Robinson v. Honolulu Rapid Transit*, 20 Haw. 426 (1911).

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6. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AFTER PLAINTIFF'S COUNSEL IMPROPERLY QUESTIONED DEFENDANT AS TO A CRIMINAL CONVICTION FOR TRAFFIC VIOLATION ARISING FROM THE SAME FACTS AS THEN BEFORE THE JURY.

In this case, Plaintiff's counsel asked the Defendant, in the presence of the jury, whether or not she had been convicted of a traffic violation arising out of the accident at issue. The question was improper, immaterial, and highly prejudicial, as inflammatory. Immediate objection was raised by Defense counsel, sustained, but the jury was left with an inference of the facts then before them, which could not be cured by instruction, and which was prejudicial to Defendant's cause.

"It has been a traditional rule that a judgement of conviction in a criminal prosecution is not admissible in a civil case as evidence of the facts upon which it was based various reasons have been assigned for this rule, it having been variously held as a foundation for the rule, that there is a dissimilarity in objects, issues, results, procedures, and parties in the two actions, as well as a lack of mutuality." 29 AmJur.2d 382, *Evidence*, Section 334. (Footnote references omitted.)



Although a Hawaii statute allows such questions in civil actions, it is limited by its terms to convictions only, and only for purposes of discrediting the witness. In the case at hand, Plaintiff's counsel was aware by his own admission before the bench (Tr 53) that the Defendant had entered a plea of *nolo contendere* to the traffic charge, and must also be charged with knowledge that such a plea, as a matter of law, is not a conviction, and cannot be used in any other action than that where the plea was entered.

"The fundamental rule is that while a plea of *nolo contendere* may be followed by a sentence, it does not establish the fact of guilt for any other purpose than that of the case to which it applies. The difference between it and a plea of guilty, therefore, is that while the latter is a confession which binds the Defendant in other proceedings, the former has no effect beyond the particular case. Consequently it can not be used against the Defendant as an admission in any civil suit for the same act." 29 Am.Jur.2d 760-761, *Evidence*, Section 702 (Footnote reference omitted.)

Thus the question was an attempt to elicit inadmissible evidence, since the "conviction" requirement of the statute (RLH 222-22) was not fulfilled. In *Bruce v. Leo*, 129 Colo. 129, 267 P.2d 1014 (1954), the Court held:

"If the plea itself could not be used in any collateral matter, it follows that anything growing out of that plea, such as a sentence, could not be used as a conviction for the plea of itself is deprived of that classification."

Further, since the terms of the statute limit the purpose of introducing such evidence to that of discrediting a witness, the evidence here was not within the statute, since it was material only to prove the facts then before the jury. Plaintiff's counsel, by his own statement in final argument, raised the materiality of this question to his cause.

(Mr. O'Connor):

"If I for one moment intimated to you that all the Code provisions that the Court is going to read to you are not applicable fully and completely to both parties, then I was in error, because they are. *And that is the foundation of Mr. Chai's case against Mrs. Hymer.*" (Argument—Tr. Add. 74) [Emphasis added.]

If, as Plaintiff's counsel states, the foundation of Plaintiff's claim against the Defendant lies in the violation of statute, then the question propounded by Plaintiff's counsel was clearly for the purpose of inferring that fact, not for the purpose of discrediting the witness, and was thus improper and highly prejudicial.

The instruction of the trial court to cure the error could not have been effective, under the circumstances in this case. The question was propounded before the jury, but no answer was heard. The inference was created, and left as an open, unanswered question in the minds of the jurors, thereafter. Under these circumstances, the words of the Court in *Young v. Price*, 48 Haw. 22, 28, 395 P.2d 365 (1964), should apply:

"It must have made a strong impression on the jury when given. It is highly doubtful that the impression, clearly prejudicial to defendants, was dispelled by the instruction to disregard the testimony."

The Court went on to say:

"We feel compelled to state that, even if the incompetent testimony elicited from the plaintiff had been much less detrimental to defendants than it was, we would not, on the trial record of this case, allow the error to stand and thus set a precedent that might be taken as militating against the professional candor which proscribes an attorney from getting evidence before a jury which he knows or should know the court should respect.

"It is our opinion that the circumstances here presented do not permit indulgence in the presumption ordinarily applicable and that, therefore, the trial court's denial of the motion for a mistrial was prejudicial error."

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#### 7. ERROR FOR THE COURT TO FAIL TO CONTROL FINAL ARGUMENTS OF COUNSEL.

In his final arguments, the Plaintiff's counsel called the jury's attention to the failure of the Defendant to introduce certain types of expert witness, when no such experts were introduced by the Plaintiff, or shown by the evidence in the case to exist at all. It is settled law that:

". . . an adverse inference from failure to produce evidence with the corresponding right of

argument, arises only where a party has introduced evidence; where he has contented himself with relying on the weakness of his adversary's case and has introduced no evidence, the inference and right of argument do not exist." 53 Am.Jur. 381, *Trial*, Section 475.

Despite objection raised by Defendant's counsel, no ruling was made on the objection, nor was a corrective instruction made to the jury, with the result that prejudicial inference was allowed to remain before the jury. In *Skelton v. Beall* (Fla. App. 1961), 133 So.2d 477, 94 A.L.R.2d 820, the Court held:

"During argument to the jury at the close of the trial, defendant's attorney attempted to comment on the failure of the Plaintiff to bring before the jury the testimony on this one disinterested witness to the accident. The court sustained an objection to such comment because it appeared the evidence was equally available to, and not presented by Defendants.<sup>1</sup> [Footnote 1. Subject to exceptions not applicable here, this is recognized as a correct ruling. 5 ALR 2d 893, 940, 941.]"

In addition, Plaintiff's counsel in his final argument misstated the law with respect to his client's right-of-way at the intersection at the time of the accident. Plaintiff's counsel argued:

"You know in your own driving that a person who has the right-of-way, if he says, well, I have got the right-of-way but I can go ahead and do anything I want because if we get into an accident, if I get into an accident with a person who

doesn't have the right of way—or vice versa, if the person who didn't have the right of way said that he could do anything he wanted to do anytime and if he gets into an accident it will be equally the fault of both persons even if the other person is exercising his right of way—wouldn't we be in a heck of a mess in a situation like that? The person who has the right of way has the privilege of exercising it. And I believe that the court is going to instruct you that the right-of-way is the privilege of immediate priority in the use of the roadway."

However, it is the settled law of Hawaii, as pronounced by the court in *Mossman v. Sherman*, 34 Haw. 477, that:

"It by no means follows, however, that this right of precedence is absolute and can be exercised with impunity under all circumstances regardless of the safety of others, to whom the operator of the vehicle owes the duty of reasonable care." *Mossman v. Sherman, supra*, 481.

Defendant's counsel again objected (Argument—Tr. Add. 74) but the Court failed to rule specifically, and allowed Plaintiff's counsel to continue without issuing corrective instructions.

Thus Plaintiff's counsel brought before the jury, in final argument, two subjects which were not proper argument as a matter of law, and in both cases, despite objections raised, no corrective instructions were issued by the Court. In *Kohlmann v. City of New York*, 8 A.D. 2d 598, 184 N.Y.S. 357, where the Court



ordered a new trial on appeal, the Court held, with respect to conduct of counsel, that:

“His conduct appears to have been calculated to influence the jury by considerations which were not legitimately before them, and cannot be dismissed as inadvertent, thoughtless or harmless. Parties to a trial, civil or criminal, have a right to have the case determined on the facts and the law applicable thereto. When misconduct of counsel in interrogation or summation so violates the right of the other party to the litigation that extraneous matters beyond the proper scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned.”

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#### 8. ERROR IN REFUSING INSTRUCTION ON THE LAW OF EXERCISING RIGHT-OF-WAY.

The instruction requested by the Defendant, No. 18 (R.62) was a correct statement of Hawaii law, taken almost directly from *Mossman v. Sherman, supra*:

“You are hereby instructed that a right-of-way is not absolute but at all times relative and subject to the fundamental doctrine that a party shall exercise the right so as to avoid any injury to himself and others.”

The instruction further expresses the Hawaii law pronounced in *Ferrage v. Honolulu Rapid Transit, supra*, where the Court held:

“The duty to observe ordinary care requires that the driver of an automobile must anticipate the



possibility of meeting pedestrians and other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision." (Citations omitted).

The Plaintiff put the question of exercise of right-of-way in issue, contending that right-of-way constituted an almost unlimited right to proceed, heedless of the consequences, as argued by Plaintiff's counsel in final argument. The requested instruction was, therefore, essential to the Defendant's case in order to present the issue to the jury of whether the Plaintiff had exercised his alleged right-of-way in accordance with standards prescribed by law.

In the arguments for the Settling of Instructions, Plaintiff's counsel urged and the Court accepted an instruction based on the Hawaii case of *Young v. H. C. & D.*, 34 Haw. 426, as a better statement of law. It was urged then, and is urged now, by the Defendant that *Young v. H. C. & D.* only has application in the instant case to the question of evidence of violation of a statute or ordinance as being evidence of negligence. The *Young* case deals with a fact situation in which no right-of-way question is involved; instead the facts are based on a moving vehicle striking an improperly marked stationary vehicle. The *Mossman* case, cited herein, deals with precisely the question at issue in this case: the right-of-way at a left-hand turn situation in an intersection. In ruling on the instruction the trial court held:

"I feel that *Young v. HC&D* goes into this and it is a better statement of the law. What you want to do? Why you feel it is necessary?" (Tr. 535).

Thus, the failure to give the instructions requested in the instant case, together with the final arguments of Plaintiff's counsel may have led the jury to a prejudicial inference of the law of right-of-way which was, in fact, erroneous. Further, the failure to give the Defendant's requested instruction to correctly state the law on the exercise of right-of-way constituted reversible error. In *Hustace v. Davis*, 23 Haw. 606, the Court held:

"That instruction was accurate, applicable and material to the point it referred to and was not included in the charge given to the court. The refusal to give it constituted error. *Nawelo v. von Hamm Young Co.*, 20 Haw. 644." [sic: 21 Haw. 644]

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### CONCLUSIONS

The Defendant-Appellant believes that the learned trial court erred in all of the instances set forth in the argument above, and that said errors were highly prejudicial to the Defendant's cause.

The claim for loss of consortium should have been stricken from the pleadings, there being no authority in this jurisdiction for allowing the claim to trial.

Evidence of the Plaintiff's prior manner of driving should have been allowed, together with cross-examination of the Plaintiff's deposition, with whatever limiting instructions necessary, to show the state of mind of the Plaintiff, for testing the credibility of the witness, and for such inferences of the Plaintiff's conduct at the time of the accident as might be reasonably inferred.

The jury's verdict was tainted by the improper communications with the Court Bailiff. Although the effect of the communications cannot now be determined, in the absence of affirmative proof that such communications were harmless, the verdict should not be allowed to stand.

The evidence at trial should not be held to be sufficient to support the jury's verdict, since no more than a mere allegation, with attempted corroboration by an improper question, of violation of a traffic ordinance were presented to support Plaintiff's position. Moreover, sufficient evidence of Plaintiff's negligence was presented to support a contra finding at law. The improper question, together with misstatements of law in final argument, the absence of cross-examination on the Plaintiff's deposition, and the absence of a necessary instruction all compounded to deprive the Defendant of a fair consideration, by the jury, of Defendant's theory of the case. The resulting verdict reflects the compounded prejudices of these errors, and should not be allowed to stand.

The Defendant, therefore, asks that the judgment entered herein in favor of the Plaintiffs be reversed, that judgment be entered in Defendant's favor, or, in the alternative, that the aforesaid judgment be reversed and that the cause be remanded for a new trial.

Dated, Honolulu, Hawaii,  
April 11, 1968.

Respectfully submitted,

ALBERT GOULD,

*Attorney for Defendant-Appellant.*

COBB & GOULD,  
*Of Counsel.*

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ALBERT GOULD

IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

KAREN JEAN HYMER,

Appellant,

vs.

BENJAMIN K. CHAI and  
VICTORIA LEILANI CHAI,

Appellees.

UPON APPEAL FROM THE  
UNITED STATES DISTRICT  
COURT FOR THE DISTRICT  
OF HAWAII

CIVIL NO. 22081

ANSWERING BRIEF

FILED

JUL 30 1968

WM. B. LUCK, CLERK

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## JURISDICTION

This is an action for damages for personal injuries brought by the plaintiffs Benjamin K. Chai and Victoria Leilani Chai, citizens of the State of Hawaii, against defendant-appellant Karen Jean Hymer, a citizen of the State of Nebraska.

The United States District Court for the District of Hawaii had jurisdiction under the provisions of Title 28 United States Code, Section 1332.

The United States Court of Appeals for the Ninth Circuit has jurisdiction under Title 28 United States Code, Section 1291.

Jurisdiction in the Court below as to the claim of plaintiff Victoria Leilani Chai is contested by appellant.

## STATEMENT OF THE CASE

On September 20, 1965, an accident occurred at the intersection of Kamehameha Highway and Lipoa Street in the City and County of Honolulu, State of Hawaii, between a motorcycle, driven by the plaintiff Benjamin Chai, and an automobile driven by the defendant. Plaintiff Benjamin Chai



was headed toward Honolulu (in an easterly direction).

Defendant was turning left across Kamehameha Highway into Lipoa Street across plaintiff's path of travel.

Plaintiffs filed a complaint alleging negligence on the part of the defendant claiming general damages for Benjamin Chai in the amount of \$75,000 and such special damages as would be proved at trial and general damages for loss of society and companionship for plaintiff Victoria Chai in the amount of \$7,500 (R. 3-4).

Defendant filed a counterclaim in the amount of \$453.12 for property damages and answered the complaint denying negligence and alleging assumption of risk and contributory negligence.

A jury verdict was returned for the plaintiffs on February 27, 1967 (Tr. 593) after a trial before Judge Martin Pence which lasted more than a week. The judgment was in the amount of \$48,000 for Benjamin Chai and in the amount of \$5,000 for Victoria Chai. The defendant filed a motion for new trial and Plaintiff filed a motion to amend their complaint. Both motions were heard by the Court below and were denied on April 5, 1967. A notice of appeal was filed on May 2, 1967.

At the intersection of Kamehameha Highway and Lipoa Street, Kamehameha Highway consists of three lanes



for travel in the Honolulu (easterly) direction. The lane nearest the curb in which the accident occurred was approximately 1/10 of a mile long on either side of the intersection (Tr. 66). The defendant had been traveling in an Ewa (westerly) direction on Kamehameha Highway prior to making her left turn across the Honolulu bound lanes.

It was during the morning rush hour and traffic was heavy. Cars in the first two lanes of traffic stopped to allow defendant to turn in front of them. Not seeing any vehicles approaching in the third lane, defendant continued on across the intersection. Unfortunately, unseen by defendant, plaintiff was traveling in the third lane in a Honolulu direction. The plaintiff's motorcycle struck the right fender and side of the defendant's car as it proceeded across the third lane of the highway.

The speed limit in this area was 35MPH (Tr. 86). Plaintiff admitted he was traveling 32 MPH at some time just prior to entering the intersection. (Tr. 182).

The motorcycle driven by the plaintiff was damaged beyond possible repair and the front was demolished. (Tr. 224) The right side of defendant's car, right fender, hood and windshield were damaged. Plaintiff was seriously injured.





### SUMMARY OF ARGUMENT

1. The trial court did not err in allowing the loss of consortium claim of Victoria L. Chai to proceed to judgment.
2. There was no prejudicial error in excluding evidence offered to show the plaintiff's prior manner of driving, as that evidence was too remote to be relevant.
3. The trial court did not err in excluding from evidence a certain portion of plaintiff's deposition in that that portion was vague and ambiguous and was not considered as plaintiff's testimony at trial and would only have served to confuse the jury.
4. Trial court did not err in denying defendant's motion for new trial as any communications between bailiff and members of the jury were not improper nor did they materially effect the jury deliberation.
5. The jury's verdict was supported by the evidence in the case and it was not err to deny defendant's motion for a trial for this reason.



6. Plaintiff's counsel's question to defendant concerning criminal conviction for a traffic violation was a proper question. If any impropriety did exist the trial court corrected it by proper instruction and did not err in denying the defendant's motion for mistrial.

7. The final argument of defendant's counsel was not improper and there was no error by the trial court in the control of that final argument.

8. The trial court did not err in refusing the defendant's requested instruction on the Hawaii Law of Exercise of Right-of-Way.

#### ARGUMENT

1. The Trial Court did not err in allowing plaintiff Victoria Chai's claim for loss of consortium to proceed to judgment. The Court had jurisdiction to entertain the claim and it is a valid cause of action.

Plaintiff Victoria Chai prayed for \$7,500.00 in the complaint for loss of consortium, and the jury returned a verdict of \$5,000.00 for her on that claim.



Although raising the jurisdictional question in her answer, defendant never once during the course of the trial or even during the hearing on the motion for a new trial raised the question of lack of jurisdiction. The trial judge first brought up the matter on his own motion during the hearing on the motion for new trial (Tr. 24) adden.

Defendant has chosen to bring this point on appeal to this court rather than seeking a decision from the trial court, probably as a result of the cases cited to both counsel by that court at our last hearing indicating rather strongly the inclination of the trial court. These included: (See Tr. p. 55-56) addendum.

Wilson v. American Chain & Cable Co.  
364 F.2d 558 (3d Cir. 1966)

Morris v. Gimbel Brothers  
246 F.Supp 984 (E.D. Pa. 1965)

Borrer v. Sharon Steel Co.  
327 F.2d 165 (3d Cir. 1964)

Raybould v. Mancini Fattore Co.  
186 F.Supp 235 (E.D. Mich. 1960)

Yuba Consolidated Gold Fields v. Kilkeary  
206 F.2d 884 (9th Cir. 1953)

Plaintiff Victoria Chai contends that her claim for loss of consortium is one of "pendent jurisdiction"





ancillary to the claim of her husband Benjamin Chai and that the common sense doctrine of pendent jurisdiction set out in the above cases applies to avoid piecemeal litigation due to limited federal jurisdiction.

In Morris v. Gimbel Brothers, Inc., (E.D. Pa. 1965) 246 F. Supp. 984, the wife brought action to recover \$100,000 for personal injury. In the same action the husband sought \$50,000 for loss of consortium. The defendant moved to dismiss the husband's claim for lack of the jurisdictional amount. The court held that as a legal certainty the husband could not recover in excess of \$10,000. Nevertheless, the defendant's motion was denied. The court said,

. . . . In the Borrer Case, however, the court had before it claims under both the Survivors act and the Wrongful Death Act of Pennsylvania and held that the federal court had jurisdiction of either claim as pendent to the other. The court pointed out that in Pennsylvania the two actions would have been consolidated, that they were for the same tort, for the same injuries and that the damages recovered in one suit were complementary to those recoverable in the other. It might be urged that the present case is distinguishable from Borrer on the ground that the parties plaintiff in the two causes of action are separate and distinct. However, in the Borrer case, although the nominal party of record was the same in both causes of action, the



actual parties in interest, namely, the wife on the one hand and the estate on the other, are just as distinct as the husband and wife in the present case. Judge Biggs in the Borrer opinion recognized that that decision was an extension of Hurn v. Oursler, supra, in that the former case involved federal and non-federal causes of action whereas the Borrer case, like the present one, is a diversity case in which federal jurisdiction turns upon citizenship and the amount involved. However, I think that the observation of Judge Biggs in the Borrer opinion, to the effect that the extension of Hurn v. Oursler is a desirable one and should be countenanced by law, is equally applicable to the present case. He said, 'Such a concept seems clearly within the contemplation of Pennsylvania practice. Such a course saves the time of jurors, of witnesses, of the parties, and of the judges, and prevents tortfeasors from being mulcted of damages.' (p. 986)

In Wilson v. American Chain & Cable Company

(3d Cir. 1966) 364 F.2d 558, a minor child sought recovery for personal injury in excess of the jurisdictional minimum. The child's father sought recovery for consequential damages to him. The trial court dismissed the father's claim for lack of the jurisdictional minimum. The appellate court reversed the dismissal. The court said that under Pennsylvania law the two claims would be dealt with in one action, and it said,

In these circumstances it seems to us both appropriate and right to apply the doctrine of pendent jurisdiction, by which a



claim cognizable in the federal courts may be permitted to carry with it a related claim otherwise not within the federal jurisdiction, if both claims ordinarily would be tried in one judicial proceeding. The basis for this doctrine is the judicial economy, and the conveniences and fairness to litigants which it serves . . . . (p. 564)

The attention of the court is directed to the footnotes in Wilson v. American Chain & Cable Co., supra, at page 564 where the Third Circuit utilized the theory of the decision of this court in Yuba Consolidated Gold Fields v. Kilkeary, supra, to support the pendent jurisdiction doctrine and distinguished this court's decision in Kataoka v. May Dep't. Store Co., 115 F.2d 521 (9th Cir. 1940) as not having considered the application of pendent jurisdiction.

In Hawaii, the law encourages wrongful death and survival actions to be brought in one and the same action. Section 246-2 of the Revised Laws of Hawaii, 1955, provide,

. . . .If an action is brought pursuant to this section (wrongful death) and a separate action is brought pursuant to section 246-6 (survival), such actions may be consolidated for trial on the motion of any interested party. . . .

It is also very clear that the policy of Hawaii is to expedite in one lawsuit the claim of one party for





personal injuries and the claim of the spouse for loss of consortium, E.g., see Halberg v. Sai K. Young, 41 Haw. 634 (1957). In this regard, Hawaii has adopted the contents of Rule 20 (a) of the Federal Rules of Civil Procedure. Rule 20 (a) of the Hawaii Rules of Civil Procedure provides:

All persons may join in one action as plaintiffs if they assert any right to relief . . .severally, . . .in respect of or arising out of the same transaction, occurrence, . . .and if any question of law or fact common to all of them will arise in the action. . .A plaintiff. . .need not be interested in obtaining. . .all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights of relief.

Plaintiff Victoria Chai therefore asks this court to adopt the theory of pendent jurisdiction in this case and sustain the judgment below.

In Hawaii there is no statute or State Supreme Court decision dealing directly with loss of consortium or loss of a spouse's services, comfort or society.

However, it has been a regular practice in the trial courts of the state for a husband to claim loss of consortium where his wife is injured, and such a cause of action can be considered a part of the common law of Hawaii.



For example, in Chester Lim and Edith Nodi Lim v. Honolulu Rapid Transit Company and Greg C. Len Wai, Civil No. 11635, First Circuit Court, State of Hawaii (1964) the wife was injured in an accident with defendant's bus and husband Chester Lim prayed for damages for himself due to loss of consortium. He recovered \$3,000 in a jury verdict for that loss, while the wife obtained a verdict of \$34,500 for her injuries.

See also Ada Morneau and Lionel Morneau, et al v. Kaiser Foundation Hospital, et al, Civil No. 7156, First Circuit Court, appealed for different purposes in 48 Hawaii 534 (1965); and Rosalie and Rex Blackburn v. Honolulu Gas Co., Ltd., et al, Civil No. 11257, First Circuit Court (1965); and Robert and Grace Rapoza v. Frank Kazusa, et al, Civil No. 8296, First Circuit Court (1963).

The Constitution of the State of Hawaii which became effective on August 21, 1959, provides in part:

Section 4. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. (emphasis added).

Since the effective date of this provision claims have been filed and disposed of in the trial



courts of the state for loss by a wife of husband's consortium when husband has been injured due to another's negligence. See Gerald S. and Arlene K. Kamoe v. Hawaiian Raceway Park, Ltd., Civil No. 17,563, First Circuit Court, State of Hawaii where the wife's claim for loss of consortium was not contested and the case was settled prior to trial.

Two cases directly in point hold that it is a denial of equal protection to deny the wife the right to sue for loss of consortium while permitting such suit by husband:

Owen v. Illinois Baking Corp. 260 F.Supp.  
820 (W.D. Mich 1966)

Karczewski v. Baltimore and Ohio R.R. Co.,  
274 F. Supp 169 (N.D. Ill. 1967)

It is submitted that loss of consortium is a cause of action which is part of the law of Hawaii, and that it would be discriminatory and a violation of Article 3 of the Hawaii Constitution, above, if the cause of action were not available to both husband and wife for respective loss of the other's services.

Therefore, it was not error for the trial court here to allow Victoria Chai's claim to be tried and a verdict returned on that claim by the jury.





2. The Trial Court properly excluded evidence offered to show plaintiff's prior manner of driving.

At three different times during the trial defendant's counsel attempted to show by different witnesses that plaintiff had, while traveling along Kamehameha Highway that morning at a point distant from the accident location, cut between two cars in the line of travel. One of the cars that he cut between was a police car driven by witness police officer Ronald Wong (Tr. 399-403). The act was witnessed by the witness Everett Lawrence (Tr. 123-126) and plaintiff Benjamin Chai was questioned concerning the act on cross examination (Tr. 233-235).

This act was a violation of a traffic ordinance (Tr. 124) and would have shown an act of possible negligence on the part of plaintiff remote from the scene of the accident and irrelevant to the case at hand.

In each instance the trial court properly sustained an objection by plaintiff's counsel to the proffered testimony.



The test for the admissibility of such evidence is thoroughly developed in the annotation Admissability, in action involving motor vehicle, of evidence as to manner in which participant was driving before reaching scene of accident. 46 ALR 2d 9 (1956), and is stated succinctly therein at page 13 as follows:

"In determining the admissability of evidence concerning the manner in which a participant to an accident was driving a vehicle before he reached the scene of the accident, as against the objection that the testimony is remote, the most important factor is the degree of probability that the conduct continued until the accident occurred . . . ."

See also pages 13-18 of the same annotation.

The evidence is uncontroverted in this case that Benjamin Chai was in one lane of travel for approximately 1/10 of a mile before the accident occurred and did not cut back and forth in that time.

Further, defendant's counsel admitted that Chai was not speeding at the distant point when he cut between the cars (Tr. 403) but only presumed from the act of cutting between cars that Chai was "hurrying."

". . . the question of remoteness depends to a great degree upon the facts of the particular case. (citations)



And the question whether the testimony as to the manner of driving before reaching the scene of the accident is admissible or should be excluded on the ground of remoteness rests in the discretion of the trial court." 46 A.L.R.2d 9 at p. 20.

The trial court properly decided in this case that the act to be testified to occurred at a point too distant from the accident scene to be relevant and that the act itself was too remote from the facts of the accident to be material.

3. The trial court correctly excluded certain portions of plaintiff's deposition as being vague, ambiguous and unintelligible.

Defendant offered as evidence that portion of plaintiff Benjamin Chai's deposition from page 17, line 4 to page 38, line 19 pursuant to Rule 26(d) (2) of the Federal Rules of Civil Procedure. (Tr. 426)

Defendant contends the court erred in refusing to allow page 31, lines 1-19 and page 32, lines 3-7 of Chai's deposition to be admitted (Tr. 432-434). The court excluded these questions and answers because they were unintelligible and would be confusing to the jury (Tr. 433).





Plaintiff's Exhibit 1, a sketch of the intersection, was used throughout the trial for reference and testimony of various witnesses. Plaintiff Benjamin Chai testified at great length from Exhibit 1 and made certain statements referring to that diagram regarding his ability to see certain portions of the intersection (Tr. 283, 285).

Defendant's Exhibit E is a rough sketch of the intersection drawn by Chai at his deposition and was in front of him while the testimony on deposition, pages 31 and 32, was taken (Tr. 302).

Defense counsel attempted to impeach plaintiff Chai without correlating the areas referred to on the two exhibits or in the two proceedings (Tr. 291). Extreme confusion resulted (Tr. 291-294). Defense counsel's later attempt to correlate the two never was successful (Tr. 302-315).

Plaintiff testified again and again during the trial that as he approached the intersection he could not see into Lane #1 (see Exhibit 1), but could see into lanes #2 and #3 (Tr. 283 and 315).

The excluded portion of the deposition on page 31 includes Chai's statement that he could not see into



the outside lane. Both court and counsel agreed that Lane 1 and the outside lane were the same (Tr. 317). When the trial judge finally worked through the maze created by the wording of questions and answers on page 31 of the deposition and Chai's testimony at trial (Tr. 316-317), he concluded that there was no impeachment and therefore page 31 was repetitious.

In Pursche v. Atlas Scraper and Engineering Co., 300 F.2d 467 (9th Cir. 1962) this court said:

We do not mean to sanction the practice of indiscriminately offering an entire deposition or encourage any attempt to thus impose upon the court. In Merchant's Motor Freight v. Downing (227 F.2d 247 (8th Cir. 1955)) the court stated that the deposition of a party might be admitted "subject to the court's right to exclude such parts thereof as might be unnecessarily repetitious in relation to the witness' testimony on the stand.

It is obvious from discussions between court and counsel (Tr. 316-322) regarding deposition, p. 31, that, taken in context with the testimony at trial, these questions and answers were ambiguous, difficult to understand, and would have confused the jury.

Referring specifically to the portion of page 33 ruled inadmissible, the court found that there was no positive means to determine the specific location



referred to in that question (Tr. 433). The question and answer read:

Q. And you indicated that when you were in the third lane at the speed you were moving, you couldn't see this portion of the intersection. Is that true?

A. Because I'm looking ahead. I have to visualize all, and it's a pretty wide intersection there.

The question is unintelligible as nothing specifically defines the words this portion.

The answer to the question is just as bad as it is impossible to determine if Chai means Yes or No.

2A Barron and Holtzoff, Federal Practice and Procedure, §654 at p. 171

When all other conditions exist which authorize the use of a deposition at a trial or hearing, it must still be determined whether the testimony is admissible in evidence. Rule 26(d) authorizes use of the deposition "so far as admissible under the rules of evidence." Rule 26(e) permits objections to be made at the trial or hearing for any reason which would require the exclusion of the evidence if the witness were present and testifying.

4. No improper communications between the Bailiff and members of the jury were shown by defendant.

While the jury was deliberating in the case, the judge, both counsel for plaintiff and for defendant, and the bailiff were in the judge's chambers at about





10:00 p.m. February 27, 1967. (Tr. Addendum, p. 17).

At this time the bailiff recited to all present certain conversations that he had had with the members of the jury while they were out for dinner (Tr. Addendum, pp. 4-18). No one present at the time considered the conversations improper or out of line, no comment was made except in a jovial conversational manner, and certainly, defense counsel made no attempt to correct any impropriety by additional instruction to the jury or by motion for mistrial at that time. Defense counsel first raised this point at the hearing on motion for new trial on March 31, 1967 (Tr. Addendum, p. 2).

At that hearing, the bailiff, Josef D. Cooper, was placed on the stand and questioned carefully by defense counsel (Tr. Addendum, pp. 6-17). The bailiff testified to several specific questions from jurors and his answers. The first was a juror named Humphrey who asked him what would happen if the jury were unable to reach a verdict? Cooper responded that if there were no decision, it would be up to the parties to decide what they would do up to that point (Tr. Addendum, p. 8).

Humphrey also asked him who paid the cost of the litigation, meaning the cost of the court's staff



and other costs incurred by the parties. Cooper responded that there were no costs which resulted in the presence of the judge, use of the courtroom, use of the staff and any other costs would be incurred by the parties themselves (Tr. Addendum, p. 9).

Humphrey also asked Cooper what would happen if one of the parties to the litigation were an insurance company, and Cooper responded that they would be treated the same way as any other (Tr. Addendum, p. 9).

There were inquiries to Cooper as to who appointed Judge Pence, and he replied that he was appointed by the President of the United States or the governor of the state (Tr. Addendum, p. 10).

There were inquiries made as to Judge Pence's personal history, was he a resident, a native of the State of Hawaii, to which he responded that he had been in Hawaii for approximately 30 years (Tr. Addendum, p. 10).

There was also an inquiry as to where Mr. Hart (another clerk) was on that day to which Cooper responded that he was unable to be in court. There were also questions as to the function served by the people who sit before the judge, namely, the clerk and the bailiff, and



Cooper explained those functions generally (Tr. Addendum, p. 10). There were other general questions concerning the law (Tr. Addendum, p. 11).

However, Cooper testified specifically that there was no reference to Chai v. Hymer, and no reference as to whether, in fact, there was an insurance company involved in that particular case (Tr. Addendum, p. 12).

Upon the completion of this testimony during the hearing on the motion, Judge Martin Pence, who was presiding and who had been present in his chambers when the conversation first occurred, stated as follows:

THE COURT: Well, I am prepared to rule that while not divorcing, I find that there is no great significance at that date, nor did I find it in my chambers; and as to the numbness, I don't state that I was numb at the time, and I wasn't shocked by the revelations of the bailiff at the moment, and I am not shocked now.

I do not feel that the conversation recited by the bailiff at that time, nor do I find that the conversation as related by Mr. Cooper here on the stand, in any way would have or did have or could have had any relevance to the case then before the jury. (Tr. Addendum, p. 22)

Before the bailiff took the jury to dinner, Judge Pence had specifically allowed conversation between bailiff and jurors at dinner, provided of course that the





conversation had nothing to do with the merits of the litigation (Tr. Addendum, pp. 7-8).

89 C.J.S., Trial, §457f., page 86

Contacts between court officers and jurors, except as authorized by the court in appropriate circumstances, are not to be countenanced. . . . Although. . . it is not misconduct if the conversation is on subjects which are unrelated to the case.

Plaintiffs submit that under the circumstances, there was absolutely no factual basis for any court or counsel to believe that the conversation between bailiff and the juror herein was improper or affected the trial of this case in any way. In any event, defense counsel waived any right to now complain as he knew of the conversations before the verdict was returned.

5. The jury's verdict was supported by the evidence and the trial court did not err in refusing to grant the motion for a new trial.

Defendant contends plaintiff was guilty of contributory negligence as a matter of law.

The evidence upon which the defendant bases this premise is:

1. Plaintiff admits to traveling at 32 mph as he entered the intersection (Tr. 257).



2. Traffic conditions were heavy and stop and go (Tr. 26).

3. Plaintiff could not see into the intersection while traveling at a high rate of speed.

4. Plaintiff did not notice that traffic had come to a complete stop.

5. Plaintiff's speed directly contributed to the extent of his injuries.

Further facts which must be taken into consideration are as follows:

1. Speed limit for plaintiff was 35 mph.

2. Plaintiff testified that the lane he was traveling in was free of vehicles, that he had a clear view of that lane (Tr. 336), and he could see into the adjacent lane at the intersection.

3. Plaintiff testified that the traffic in the adjoining lane at the intersection came to a stop just as he arrived at the intersection (Tr. 299).

4. There was no conclusive evidence in the case that plaintiff's speed, considering the traffic and the conditions at the intersection, was unreasonable under the circumstances.



Plaintiff admits that under certain circumstances one can be contributorily negligent as a matter of law, Ferrage v. Honolulu Rapid Transit, 24 Hawaii 87 (1917), but courts have been extremely careful in adopting this principle. For example, see the case cited in defendant's brief at page 45, Young v. Price, 47 Hawaii 309, 388 P.2d 203 (1963). The Supreme Court of the State of Hawaii initially decided that plaintiff was guilty of contributory negligence as a matter of law and then on rehearing, reversed itself. See Young v. Price, 48 Hawaii 22, 395 P.2d 365 (1964) where the court said:

The basic rule governing the determination of whether there was sufficient evidence to take the contributory negligence issue to the jury is . . . the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and the inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury.  
p. 24.

The facts presented in this case clearly make the negligence of Benjamin Chai a matter for the determination of the jury under proper instructions.

More than sufficient evidence existed to support



the jury's verdict that defendant was negligent and her negligence was a proximate cause of plaintiff's injuries.

For example, Section 15-8.2(4) of the Traffic Code of the City and County of Honolulu states:

Vehicles intending to turn left from a divided highway, exit from which is made by means of a left-turn decelerating lane constructed in the medial strip area, shall enter the decelerating lane and shall yield the right of way to approaching vehicles before proceeding with caution across the intersection and into the intersecting roadway. . .

Section 15-11.2 reads:

The driver of a vehicle within an intersection intending to turn left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection, or so close thereto as to constitute an immediate hazard.

In Hawaii, a failure to observe the requirements of a traffic ordinance is evidence of negligence. Young v. HC&D, 34 Hawaii 426 (1938).

A jury verdict supported by substantial evidence, more than a mere scintilla, will not be disturbed.

Howell v. Associated Hotels Ltd.,  
40 Hawaii 492 (1954)

Tradewind Transp. Co. v. Taylor,  
267 F.2d 185 (9th Cir. 1959)





From all of the facts contained in the transcript, it would appear that when defendant turned left in front of Chai's path of travel, she did not hear Chai, did not see Chai and did not pause at the third lane to check for oncoming vehicles, and this evidence was more than sufficient to support the jury's verdict. We submit that the trial court did not err in refusing defendant's motion for a new trial.

6. Court did not err in denying defendant's motion for mistrial.

Counsel for defendant confuses two completely different principles of evidence in urging on this court the proposition that there was any error in asking plaintiff if she had been convicted of an offense arising out of this accident.

The two principles involved are:

- (a) Admission
- (b) Credibility

If the evidentiary theory for admissibility was admission, and knowing that defendant had pleaded "No contest" to the traffic charge, it would have been improper for plaintiffs' counsel to ask what her plea was since that plea is not an admission.

However, Section 222-22, Revised Laws of Hawaii



1955, reads as follows:

Discrediting witnesses by proof of conviction. A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.

In Hawaii, according to Section 222-22, a witness may be questioned as to whether or not he had been convicted of an offense to test his credibility.

This was precisely the question put to defendant Mrs. Hymer.

The offer of proof made by plaintiffs' counsel to the court below was that "Mrs. Hymer was convicted for such an offense." (Tr. 52). "She went down to the Pearl City Traffic Court, pleaded No Contest, and was found guilty by the judge." (Tr. 52).

The question was asked, as allowed by the statute, to impeach the credibility of the witness by a conviction, not to show an admission by a plea of guilty.

The trial court missed the significance in these two different evidentiary bases (Tr. 53) and sustained plaintiff's objection to the question.



Any prejudice which might have resulted to plaintiff from the wording of the question was more than adequately cured by the court below in its instruction to the jury right at that time:

The objection to the last question is sustained.

Ladies and gentlemen of the jury, I can tell you that the mere fact that a question is asked regarding a conviction, and so forth, and the objection to that is sustained, that you cannot presume from that that she was convicted or wasn't convicted. The matter of the present status is that the objection is sustained and you will ignore the question and all the implications which might arise in the question itself. (Tr. 51-54)

The ordinary presumption is that a jury will abide by the court's instruction to disregard anything that has been improperly placed before it.

State v. Cavness,  
46 Hawaii 470, 381 P.2d 685 (1963)

53 Am.Jur., Trial,  
§506, p. 408

Plaintiff contends that counsel did not ask an improper question, but if he did, the court cured any impropriety with its quick and specific instruction.

7. Defendant contends that plaintiffs' counsel was improper in portions of his argument to the jury and that the trial court erred in failing to keep plaintiffs' counsel within the boundaries recognized





at law. Defendant cites two specific instances of this impropriety.

The first is that plaintiffs' counsel argued law to the jury in final argument misstating the Hawaii law of right-of-way.

The second is an allegation that plaintiffs' counsel called attention to the failure of defendant to call certain types of expert witnesses when no such experts were called by plaintiffs were shown to exist.

In response to the first so-called impropriety, the court's attention is directed to the transcript addendum, pp. 72-74. Plaintiffs' counsel, during this portion of the argument, was reading certain sections from the Traffic Code of the City and County of Honolulu which were adopted by the court as a portion of its instructions (see Tr., pp. 561-564) and relating them to the facts in evidence.

The specific objection made by defense counsel to this argument is shown on transcript addendum, p. 73 as follows:

MR. GOULD: If the Court please, I am awfully reluctant to interrupt again but counsel is attempting to testify that Mr. Chai is not susceptible to



all the ordinances. He said this ordinance as applicable to Mr. Chai --

No objection was made by the defense that there was a misstatement of law and the attention of the court was not called at that time to any possible misstatement of law by plaintiffs' counsel. The defense would now have this court on appeal consider for the first time the factor in final argument which it did not bring to the court's attention at the time of the argument, supposing that in fact such a misstatement was made.

The court properly cautioned the jury in its instruction on p. 73, and the plaintiffs' counsel corrected his statement in his immediate comment to the jury on pp. 73 and 74 of the transcript addendum, where he said:

"If I for one moment intimated to you that all the Code provisions that the Court is going to read to you are not applicable fully and completely to both parties, then I was in error because they are. . . ."

The second impropriety cited by the defendant is that plaintiffs' counsel argued that the defense did not present an expert in the courtroom who would have given an estimate on speed based on the physical factors which were in evidence regarding the accident, namely, the damage to the automobile and the positions of the vehicles after the accident.



This was proper comment under the circumstances in that defendant had made an issue in the case of plaintiff's speed in an attempt to show contributory negligence of the plaintiff. The only evidence adduced at the time of argument as to plaintiff's speed was plaintiff's statement that he had seen his speedometer soon before the accident and it read 32 mph (Tr., p. 257), the physical facts surrounding the accident and the testimony of the witness Lawrence that he heard a roar of acceleration from plaintiff's motorcycle that continued all the way until the point of impact and that Lawrence estimated the speed to be between 30 and 40 mph (Tr. 153).

Faced with no positive evidence that plaintiff was speeding, defendant insisted upon arguing to the jury that, in fact, plaintiff Chai was speeding (see transcript addendum, pp. 30 and 40).

Since plaintiff had produced positive evidence regarding speed, it was proper in argument to comment that defendant had not. See 53 Am.Jur. 381, Trial, Sec. 475 and 5 A.L.R.2d 893 at p. 895.



8. Trial Court did not err in denying  
Defendant's instruction No. 18.

Defendant's instruction No. 18 reads as follows:

"You are hereby instructed that a right-of-way is not absolute but at all times relative and subject to the fundamental doctrine that a party shall exercise the right so as to avoid any injury to himself and others."

In instructing the jury (Tr. 545-581), the court did give the following instructions. He defined negligence (Tr. 558), ordinary care (Tr. 559), proximate cause (Tr. 565-566), contributory negligence (566). He also gave Section 15-2.17(1) of the Honolulu Traffic Code as an instruction as follows:

"Right-of-way is the privilege of the immediate priority -- the privilege understand -- the privilege of immediate priority of use of the road." (Tr. 561)  
(the emphasis was added by the court.)

And at page 564 the court again instructed on right-of-way as follows:

"We have to go back to the right-of-way again. What is the right-of-way? A right of way is a privilege. It doesn't say it is a right. It is a privilege, immediate priority of the use of the roadway." (Tr. 564).





He further instructed the jury as follows:

"Now, you are instructed, as I read it to you, that the Traffic Code of the City and County of Honolulu prescribes therein certain duties for the protection and safety of others. Nevertheless, a violation of the Traffic Code is not absolutely and of itself conclusive as to the liability of the violator. However, if you find a reasonable and logical connection between a failure to observe the requirements of this Code and an injury which is claimed to have been caused by that failure, then the negligence of the duty imposed by the Code is evidence of negligence, evidence of negligence to be considered by you together with all the other evidence in the case. (Tr. 594-595).

Defendant took Instruction No. 18 from Mossman v. Sherman 34 Hawaii 477 at page 481 which reads as follows:

"It is true according to the defendant's testimony that he reached the intersection of the two streets ahead of the other colliding car. Under section 66 of the traffic code which provides that 'the operator of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection' the defendant had the right of way. It by no means follows, however, that this right of precedence is absolute and can be exercised with impunity under all circumstances regardless of the safety of others, to whom the operator of the vehicle owes the duty of reasonable care.

In the recent case of McCombs v. Ellsberry, 337 Mo. 491, 85 S.W. (2d) 135, the supreme court of Missouri expressed this view in the following language: 'The mere fact that the operator of a motor vehicle



reaches and enters an intersection prior to the entry of another automobile therein does not in and of itself give such operator the right to proceed across the intersection in any event; and where it becomes an issue of fact for a jury to determine whether or not in approaching or proceeding across an intersecting highway the operator of the motor vehicle first reaching or entering upon the intersection, in the exercise of due care, might have avoided a collision and resultant injuries, and instruction to the effect that irrespective of the existing conditions such operator has a right to proceed across the intersection is erroneous."

It is obvious from the above language that Mossman v. Sherman stands for the proposition that it is error to instruct that an operator with the right-of-way has an absolute right to proceed across an intersection.

Judge Pence made it very clear in the instructions given that any right of way in this case was a privilege and not a right and further gave sufficient general instructions on negligence, proximate cause and contributory negligence to completely cover the concept that an ordinance giving either party the right of way does not in and of itself give that party a right to proceed in any event as advanced in both Mossman v. Sherman and McCombs v. Ellsberry.



In determining whether a court errs in denying an instruction, the instructions given to the jury must be considered as a whole. Cozine v. Hawaiian Catamaran Ltd. 49 Hawaii 77 (1966).

It is not error to deny an instruction adequately covered by those given.

Taking all of the instructions given in this case as a whole, the concept of right of way of Mossman v. Sherman, Supra, was thoroughly covered and no error resulted from a failure to give Instruction No. 18.

#### CONCLUSION

The case of both Plaintiffs and Defendant was fairly presented to the jury which was thoroughly and correctly instructed on the applicable law by Judge Martin Pence, and which after a long deliberation returned a verdict for the Plaintiffs.

The trial court did not err in any of the instances set out above for the reasons stated in this brief.

The court below had jurisdiction of both claims through the exercise of the doctrine of pendant



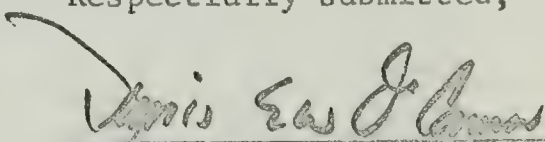


jurisdiction.

The Plaintiffs therefore ask this court to affirm the judgment entered below.

DATED: Honolulu, Hawaii, July 29, 1968.

Respectfully submitted,

  
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



DENNIS E. W. O'CONNOR



No. 22,081

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

KAREN JEAN HYMER,

*Appellant,*

VS.

BENJAMIN K. CHAI, and

VICTORIA LEILANI CHAI,

*Appellees.*

**Upon Appeal from the United States District Court  
for the District of Hawaii**

**REPLY BRIEF OF DEFENDANT-APPELLANT**

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WM. B. LUCK



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BENJAMIN K. CHAI, and

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*Appellees.*

Upon Appeal from the United States District Court  
for the District of Hawaii

**REPLY BRIEF OF DEFENDANT-APPELLANT**

---

**1. THE TRIAL COURT ERRED IN ALLOWING THE LOSS OF  
CONSORTIUM CLAIM OF PLAINTIFF'S WIFE TO PROCEED  
TO JUDGMENT.**

The plaintiff, Victoria Chai, contends that her claim for loss of consortium is one of "pendent jurisdiction", citing *Morris v. Gimbel Bros., Inc.*, 246 F. Supp. 984 (E.D. Pa. 1965) as authority. The citation of this case, and others in the same line (Ans. Br. p. 6) are inapplicable to the facts of the present case in two respects: (1) There is no Hawaii Statute allowing the recovery for loss of consortium by a wife; (2) Even if Hawaii had such a statute, a per-

sonal injury action for damages for injury sustained, and an action by the injured person's spouse for loss of consortium, are two separate and distinct actions and ancillary jurisdiction would not suffice to boost the wife's claim over the jurisdictional limit.

Each of the cases cited by the plaintiff in support of "pendent jurisdiction" involves a situation where the legitimacy of the ancillary cause of action is undisputed. Such is not the case here—Hawaii's law does not allow the recovery for loss of consortium by a wife (Open. Br. pp. 30, 34-36) and thus the argument of "pendent jurisdiction" is irrelevant—there is no ancillary cause of action to be joined. *Morris v. Gimbel Bros., Inc.*, supra, can thus be distinguished by the fact that Pennsylvania has such a cause of action. An additional distinguishing feature of no small import is the presence in *Morris* of a strong Pennsylvania policy of unique dimensions, which is well-stated in *Wilson v. American Chain & Cable Co.*, 364 F2d 558, 564 (3d Cir. 1966) (Ans. Br., pp. 8-9):

"In cases of this kind where parent and child or husband and wife are claimants, Pennsylvania statutes for many years have required that the 'two rights of action shall be redressed in only one suit, brought in the names of the parent and child [or the husband and wife].' (citations omitted) These statutory requirements have been continued under the rule-making power in the Pennsylvania Rules of Civil Procedure (Rule 2228), 12 P.S. Appendix . . . We give recognition to this policy of Pennsylvania in treating

the father's claim as pendent to that of the minor. Indeed the father is the party plaintiff in both claims."

Hawaii has neither the cause of action involved nor a comparable policy to Pennsylvania and thus the citation of the line of cases exemplified by *Morris* has no application to the facts of the present case.

A personal injury action for damages and an action by the injured person's spouse for loss of consortium constitute two separate and distinct actions. *Campbell v. City of Atlanta*, 277 FSupp 395, 396 (N.D. Ga. 1967), a removal proceeding involving a husband's action for personal injuries and a wife's claim for loss of consortium which did not meet the jurisdictional amount requirement, illustrates this well in a direct confrontation with the pendent jurisdiction argument.

"... Before jurisdiction of one question clearly within the jurisdiction of a federal court, can carry with it pendent jurisdiction over another clearly not within it, the relationship between the two must be such that, in reality, only one 'Constitutional case' is involved.

Applying this test in the present case, it is clear that here more than one case is involved. This is true since, under Georgia law, the two causes of action, one by the husband and one by the wife, are not the same. Also under Georgia law consolidation could not be compelled, no privity would exist between the plaintiff husband and the plaintiff wife, and a judgment in one of the cases would not be *res judicata* as to the other. (citation omitted)

We are aware that several of the cases previously cited, notably those from the Third Circuit, have retained cases not otherwise cognizable in federal court on the basis of pendent jurisdiction and under circumstances quite similar to those here involved. See *Borror v. Sharon Steel Co.* and *Morris v. Gimbel Bros., Inc.*, both *supra*. These cases rely heavily, however, on a Pennsylvania statute (later a rule of court) affirmatively requiring such companion cases to be either sued jointly or consolidated for trial . . .”

Plaintiff's claim that the policy of Hawaii law is to encourage wrongful death and survival actions to be brought in one action is irrelevant, since unlike the present case the same injuries are involved and the damages recoverable in one suit are complementary to those recoverable in the other.

---

**2. IT WAS PREJUDICIAL ERROR TO EXCLUDE EVIDENCE OF PRIOR MANNER OF DRIVING.**

The plaintiff has failed to rebut any of the allegations made in point 2 (Open. Br., pp. 7-12, 31, 37-39) and thus they must be deemed uncontroverted. The plaintiff weakly claims that because he was in one lane of travel for approximately 1/10 of a mile before the accident occurred evidence of his negligence moments earlier is somehow “too remote”, and cites 46 ALR2d 9, 13 (1958), as authority. Such reasoning is even more curious when one reads the annotation cited, for it says nothing of the kind and,



in fact, would seem to be favorable to the defendant's position.

It is important to note that the evidence in dispute here was not offered to prove a speeding violation, or any other specific violation of the law, but merely to help forge a chain of actions showing that the party was driving his motorcycle in a reckless manner at the time of the accident, and secondarily, to test his credibility. (§§ 13, 14, 18 of 46 ALR2d are of particular interest.) The exclusion of such evidence was highly prejudicial to defendant's right to prove contributory negligence or assumption of risk by the plaintiff.

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**3. TRIAL COURT ERRED IN EXCLUDING PORTION OF DEPOSITION, WHERE SAID PORTION RELATED TO PLAINTIFF'S AWARENESS OF TRAFFIC AND CREDIBILITY AS A WITNESS.**

The language of Rule 26(d) F.R.C.P. is clear as to the admissibility of depositions to test the credibility of the witness at the trial where inconsistencies exist between the deposition and the testimony offered in trial. As stated in *Cleary v. Indiana Beach, Inc.*, 275 F2d 543, 550 (1960), cert. den. 364 US 826, 81 S.Ct. 62, 5 LEd2d 53:

"After plaintiff had testified on direct and cross-examination, the court admitted in evidence, and permitted defendant to read to the jury portions of plaintiff's pre-trial deposition. That ruling was not error but was in accordance with the provisions of Fed. R. Civ. Proc. 26(d)(2), which permits the deposition of a party to be used by

an adverse party for any purpose.” [See also, *Pfotzer v. Aqua Systems*, 162 F2d 779 (1947)].

The plaintiff cites *Pursche v. Atlas Scraper & Engineering Co.*, 300 F2d 467 (9th Cir. 1962), a case clearly distinguishable from the case on hand. In *Pursche* the defendant was trying to offer the deposition of the plaintiff en masse as original evidence. Such is not the situation in the present case, in which the defendant sought only to point out the inconsistencies in the plaintiff's testimony in his deposition and at the trial. Furthermore, the cases can also be distinguished by the fact that the *Pursche* court indicated that it would have ruled differently if the failure to admit the deposition resulted in prejudice to the defendant's case, but that the defendant never offered to prove that the plaintiff's testimony at the trial fell short of the deposition (300 F2d at 488, 489).

Defense counsel in the present case made an offer of proof and clearly warned of the prejudice resulting from the exclusion of inconsistent statements in his attempt to prove contributory negligence (Tr. pp. 432-434). It cannot be challenged that the plaintiff's visibility in the intersection was essential to the issue of contributory negligence, and, in fact, the plaintiff has not denied it.

The claim that certain highly important questions and answers (Tr. pp. 432-434) were unintelligible and confusing is inconsistent with the fact that the plaintiff himself drew the exhibit from which he

testified, and the fact that the jury had access to such exhibit. The transcript (Tr. pp. 283-322) shows that the plaintiff clearly understood the question. The claim that defense counsel failed to correlate the two exhibits relating to the plaintiff's conflicting testimony is superfluous; defense counsel was never given a chance to correlate them (Tr. 432-434), and thus the jury was deprived of their right to judge the credibility of the plaintiff's testimony.

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**4. IT WAS PREJUDICIAL ERROR TO DENY NEW TRIAL AFTER IMPROPER COMMUNICATIONS WITH THE JURY.**

An analysis of plaintiff's citation of authority (Ans. Br., p. 22) for the proposition that "it is not misconduct if the conversation is on subjects which are unrelated to the case" is quite revealing. The cases cited within the general encyclopedia citation (89 CJS Trial, § 457f., p. 86) contain quite different fact situations from the present case.

In *Owings v. Webb's Ex'r.*, 202 SW2d 410 (Ky. Ct. of App. 1947), the improper communication consisted of the clerk of court, during recess, conversing separately with two jurors concerning where a corn shredder was then operating in the community and where they would eat lunch that day. And in *Jardine Estates v. Donna Brook Corp.*, 162 A2d 372 (NJ Super. Ct. 1956), the improper communication consisted of the bailiff's entry into the jury room twice to retrieve coats of extra jurors and find a missing wallet. The defendant readily agrees that

communications of this nature, though improper, may not constitute reversible error, but that the facts of the present case are clearly distinguishable.

It is submitted that the proper law to be applied is that of *Panko v. Flintkote Co.*, 80 A2d 302 (NJ 1951), in which the facts are much more similar to the present case. In *Panko*, a brother-in-law of one of the jurors placed a telephone call to an officer of the defendant corporation and inquired as to the amount of liability insurance carried by the defendant. Shortly after determining that the insurance coverage was \$250,000, the jury returned a \$60,000 verdict for the plaintiff. In reversing this judgment, the New Jersey Supreme Court discussed at length the right of a party to an action to have jurors free from improper influences, pointing out that the test for determining whether a new trial will be granted due to improper communications is whether the irregular matter had the capacity to influence the result, nor whether actual influence resulted. The court then discussed the prejudicial effect of the communications regarding the insurance coverage.

“ . . . If knowledge of the amount of the insurance influenced the juror in question there was not a fair trial. Furthermore, it is impossible to say what influence the argument and personality of that juror, motivated by such knowledge may have exerted upon his fellow jurors during their deliberations, even if he did not disclose the amount of the defendant's insurance coverage. We think, however, it was a factor which entered into the result although we express no opinion

as to whether or not the verdict is excessive because of our view that there must be a new trial. In order that there may be confidence in trial by jury it is necessary that parties are to feel sure that verdicts are based upon honest consideration of the evidence and not upon prejudice or sympathy." [80 A2d at 306; see also *Butters v. Wann*, 363 P2d 494 (Colo. 1961)]

Plaintiff's contention that there is no factual basis to support a finding that the improper conversation affected the trial "in any way" is equally untenable. The nature of the questions as to the possible effect of the juror's failure to agree on a verdict, and as to the effect upon litigation if one of the parties were an insurance company, indicates that the jury was deadlocked at the time the questions were asked, and gives rise to the implication that the answers afforded by the bailiff were material to the ability of the jury to reach a verdict (Open. Br., pp. 42-44).

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**5. IT WAS PREJUDICIAL ERROR TO DENY MOTION FOR NEW TRIAL AFTER A VERDICT NOT SUPPORTED BY THE EVIDENCE.**

Throughout the trial and continuing in his appellate brief, the plaintiff has sought to free himself from contributory negligence as to speed by emphasizing that he was within the posted speed limit of 35 m.p.h. The plaintiff fails to realize a basic principle of negligence law, i.e., that compliance with a statutory standard of conduct is not necessarily due care (Prosser, Law of Torts § 35 (1964)). The language of



the Honolulu Traffic Code § 15-7.1 (1965) is particularly relevant:

“(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.”

Thus the plaintiff's admission that he was travelling at 32 m.p.h. (35 m.p.h. limit) as he entered a busy intersection (Tr. pp. 257-258), and his further admission that traffic conditions were of a heavy, stop and go nature (Tr. p. 26) were extremely important to the defendant's efforts to prove contributory negligence. The posted limit was intended to serve as a maximum limit under ideal conditions, and such conditions were absent at the time of the collision in question.

The plaintiff has also failed to deny or impeach the testimony of witness Lawrence on the question of speed (Tr. pp. 149, 153, 154) conclusively proving that the plaintiff entered the intersection at an unreasonable and imprudent rate of speed under the circumstances of heavy, stop and go traffic.

In addition to the unreasonable rate of speed, the defendant showed that plaintiff was unable to see into the intersection while travelling at such speed, and

had failed to notice that traffic had come to a complete stop when he entered the intersection.

The landmark case in Hawaii as to contributory negligence is *Ferrage v. Honolulu Rapid Transit & Land Co.*, 24 Haw. 87 (1917), wherein the court stated:

“The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. . . . The evidence clearly showed that the plaintiff approached the street intersection at an excessive rate of speed, and without attempting to slow down until the street car came into view, so that it was impossible for him to either stop or turn his car so as to avert the collision. That was negligence as matter of law, and the jury could not have said that it did not contribute to the injury.”

It is submitted that, upon the evidence of plaintiff's speed, lookout, and reckless manner of driving his motorcycle moments before the impact, taken as an entity, a jury could not legally find that the plaintiff's conduct did not contribute to, if not a sole cause of, his injuries. Thus, contributory negligence as a matter of law should have been found, and in its absence, a new trial should have been granted on grounds of insufficient evidence to support a verdict.



6. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AFTER PLAINTIFF'S COUNSEL IMPROPERLY QUESTIONED DEFENDANT AS TO A CRIMINAL CONVICTION FOR TRAFFIC VIOLATION ARISING FROM THE SAME FACTS AS THEN BEFORE THE JURY.

Plaintiff's brash accusation that defense counsel is unable to distinguish between the principles of admission and credibility of evidence law shows a misunderstanding of the defendant's position and of the meaning of § 222-22, Revised Laws of Hawaii (1955), which provides that:

"A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such a conviction."

Upon the basis of this statute, plaintiff's counsel asked defendant, in the presence of the jury, whether or not she had been convicted of a traffic violation arising out of the accident at issue. The court properly sustained an objection to the question based on the fact that the question was intended to induce an admission and that defendant had entered a plea of *nolo contendere* to the traffic charge, which plea does not constitute a conviction.

Furthermore, even if the plaintiff were only testing defendant's credibility, the question still would not be sanctioned by § 222-22, since that section was not intended to, nor has it ever been stretched beyond reason to include a traffic plea within the "or

other offense" language of the statute. The credibility of witnesses has been challenged under this statute only in criminal cases and generally has been applied when the prior offense has been a felony, particularly an offense involving moral turpitude. *Territory of Hawaii v. Warner*, 39 Haw. 386 (1952), illustrates this well.<sup>1</sup>

It is submitted that this is conclusive proof that § 222-22 and its statutory predecessors were intended to refer to the impeachment of witnesses at a crim-

---

<sup>1</sup>The defendant was indicted on five counts charging him with inducing, compelling, and procuring a young woman to practice prostitution and to hold herself out as a prostitute with intent in the defendant to obtain a portion of the gains earned by her as a prostitute, and the court permitted the jury to be informed of the verdict of guilty by a jury in a former case of the same nature against the defendant in which a motion for a new trial was then pending. After much discussion over the meaning of "conviction" in the statute, the Hawaii Supreme Court affirmed the use of the "pimping" conviction to impeach the defendant. The remainder of the Hawaii cases interpreting § 222-22 are presented here, with the nature of the action indicated first, followed by the type of prior conviction used to test credibility of the witness under this statute: *Territory of Hawaii v. Henry*, 39 Haw. 296 (1952) (criminal assault; assault); *Territory of Hawaii v. Shishido*, 39 Haw. 265 (1954) (abortion & abortion); *Territory of Hawaii v. Peter L. Young*, 37 Haw. 150 (1945) (criminal abortion; drunkenness); *Territory of Hawaii v. Wright*, 37 Haw. 40 (1944) (criminal; heedless driving); *The King v. Apuna*, 3 Haw. 166 (1869) (criminal sale of opium; written confession of purchase); *Territory v. Wong Pui*, 29 Haw. 441 (1926) (criminal assault with deadly weapon; confession); *Territory v. Bodine*, 32 Haw. 528 (1932) (criminal intent to rape; prior immoral conduct); *Territory v. Sadao Honda*, 31 Haw. 913 (1931) (criminal assault with intent to ravish; prior police raids); *Territory v. Bansuelo*, 30 Haw. 832 (1929) (criminal carnal abuse of minor; promiscuity); *Territory v. Goo Wan Hoy*, 24 Haw. 741 (1919) (criminal; unknown); *Republic of Hawaii v. Luning*, 11 Haw. 390 (1898) (criminal sodomy; stealing); *Republic of Hawaii v. Saku Tokuji*, 9 Haw. 548 (1894) (criminal arson; assumed name); *Territory of Hawaii v. Boyd*, 16 Haw. 660 (1905) (criminal embezzlement; indictment for same); *Provisional Government of the Hawaiian Islands v. Aloiau*, 9 Haw. 399 (1894) (criminal gaming, unknown).

inal trial, and that, most certainly in the alternative, the phrase "and other offense" was never intended to include a traffic plea of *nolo contendere*. It is also submitted that such prejudice was not cured by the court's instruction (See Open. Br., pp. 48-51).

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**7. IT WAS PREJUDICIAL ERROR FOR THE COURT TO FAIL TO CONTROL FINAL ARGUMENTS OF COUNSEL WITHIN BOUNDARIES RECOGNIZED AT LAW.**

Plaintiff's assertion as a proposition of law that "since plaintiff had produced positive evidence regarding speed, it was proper in argument to comment that defendant had not" is a gross misstatement of law. An analysis of his cited authority is again quite revealing (Ans. Br. p. 31):

"The failure of either party to a civil action to examine a *witness equally accessible* to both offers no foundation for a prejudicial inference and is not a proper basis for argument. But the fact one of the parties fails to call a witness who under the circumstances of the case would *naturally be a witness in his behalf* may be commented upon by opposing counsel." (53 Am. Jur. § 475) (emphasis added).

There was absolutely no foundation in the records for an implication that experts were available or even more fundamental, that an expert would have been able to give an opinion under the circumstances of the case. An analysis of the cases listed in support of the general encyclopedic citation also reveals that in each of the cases, comments were allowed on the

failure to appear of an M.D. who first treated the claimant (*Nantron v. General Title & Marble Co.*, 121 SW2d 246 (1938)); a party who failed to testify (*Block v. Rackers*, 256 SW2d 760 (1953)); and a psychiatrist who examined defendant on defendant's request and at the state's expense. In each of these cases the court allowed the comment because of the first-hand knowledge of the material issues which the potential witnesses had and, equally important, the potential witnesses were shown to have been readily available and "natural" witnesses in the cases. The Missouri Supreme Court well stated the matter in *Block v. Rackers*, supra:

"Further, it is well settled that the failure of a party having knowledge of the facts and circumstances vitally affecting the issues on trial to testify in his own behalf, or to call other witnesses within his power who have knowledge of such facts and circumstances, raises a strong presumption that such testimony would have been unfavorable, and damaging to the party who fails to proffer the same. Such failure may be commented upon in argument." (256 SW2d at 764; plaintiff's citation to 5 ALR2d 895 contains only cases with the above circumstances, and hence is not applicable to the present case).

Such is not the situation in the present case: there was no foundation in the record for an implication that any expert had first-hand knowledge of the facts, that such an expert was available, nor even that an expert could have rendered an opinion under the facts of this case. Thus, the plaintiff's comment on

the failure of the defense to produce an expert (Arg.-Tr. Add. pp. 75, 76)—without specifying what type of expert or opinion was called for—was unwarranted, contrary to law, and highly prejudicial, as the jury could not have helped but get the impression that defendant was holding back unfavorable testimony.

Defendant also refutes plaintiff's claim that there is no positive evidence that plaintiff was speeding by citing the plaintiff's admission as to his speed (Tr. p. 257), the nature of traffic (Tr. p. 26), and the witness Lawrence's testimony (Tr. p. 149; Open. Br. pp. 19-21).

As to the plaintiff's impropriety in his final argument in misstating the Hawaii law of right of way, see Open. Br. pp. 52-54.

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**8. THE TRIAL COURT ERRED IN REFUSING INSTRUCTION ON THE LAW OF EXERCISING RIGHT-OF-WAY.**

The plaintiff does not deny that defendant's requested instruction No. 18 is a correct statement of the law, but rather contends that the content of such instruction was adequately covered in the instructions generally, and that it is not error to deny an instruction adequately covered in a general manner by those given (Ans. Br. p. 35). Such, however, is not the status of the law in Hawaii.

In *Young v. Price*, ..... Haw. .... (No. 4531, June 7, 1968), the Supreme Court of Hawaii was



faced with this precise issue. In this negligence action, the plaintiff proffered an instruction relating to defendant's duty of care which was a verbatim statement of the law as stated in a recent case. The defendant contended that the statements in plaintiff's requested instruction were fully covered by defendant's separate instructions, which consisted of definitions of negligence, and of ordinary care, and one which stated that the amount of care varies in proportion to the duty of danger present. The court found that it was error for the trial court to refuse to give the plaintiff's requested instruction and stated rationale highly pertinent to the case on hand:

"Defendant's Instruction No. 10 defines 'negligence', No. 11 defines 'ordinary care' and No. 19 states that the amount of care varies in proportion to the degree of danger present. They are all general instructions. None of the instructions relates to the law of negligence with respect to a hose on the sidewalk, nor the specific duty of defendants to warn or protect pedestrians when a hose is placed across a sidewalk. Where instructions are asked which correctly state the law on any issue presented, it is error to refuse to give them unless the points are adequately covered by instructions given. *It is generally considered error to refuse to give a requested instruction on a given point which is accurate and applicable though the point may have been unequivocally covered by a general instruction which was given.*" (P. 10 of advance sheet) (emphasis added).

The facts of the present case are directly on point. The defendant requested a specific instruction which was a correct statement of the law of right-of-way in Hawaii and based almost verbatim on *Mossman v. Sherman*, 34 Haw. 477 (1938) and *Ferrage v. Honolulu Rapid Transit*, 24 Haw. 87 (1917). The trial court refused to give such instruction, however, and instead gave general instructions defining negligence, ordinary care, proximate cause, and contributory negligence. The court also mentioned right-of-way but did not give the specific rules set forth in *Mossman* and *Ferrage*, supra, and in fact, based its instruction on a fact situation in which a right-of-way question was not even involved! Thus we have a fact situation upon which the law of this jurisdiction is clear, and *Young v. Price*, supra, should apply.

Dated, Honolulu, Hawaii,  
September 26, 1968.

Respectfully submitted,

ALBERT GOULD,

*Attorney for Defendant-Appellant.*

COBB & GOULD,  
*Of Counsel.*



No. 22080 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROBERT F. FREEDMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

BRIEF FOR THE APPELLANT.

---

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**FILED**

**JAN 26 1968**

**WM. B. LUCK, CLERK**

FEB 5 1968

### **Errata.**

On page 3 the Jurisdiction was inadvertently omitted.  
Should read:

### **Jurisdiction.**

The District Court had jurisdiction under Section 3231 of Title 18, and this Court has jurisdiction of the Appeal under 28 U.S.C. 1291, 1294(1) and Rule 37(a) of Federal Rules of Criminal Procedure.

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No. 22080

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT F. FREEDMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR THE APPELLANT.

---

### Statement of the Case.

On December 15, 1966, the grand jury for the United States District Court, Central District of California, brought an indictment against the appellant, Robert F. Freedman, on two counts. The first count charged the co-defendant, Jack Vertlieb, with engaging in the business of accepting wages and failing to pay the occupational tax required by Title 26, United States Code, Sections 4411 and 4412, in violation of Title 26, United States Code, 7201, and charged the appellant, Robert F. Freedman, with aiding and abetting in this offense. The second count charged the same violation, but alleged that appellant was the principal, and Vertlieb, the aider and abettor.

Appellant plead not guilty, and thereafter moved to dismiss the indictment on grounds that the tax and registration requirements of Sections 4411 and 4412 of Title 26, were in violation of the Fifth Amendment to

the United States Constitution. This motion was denied on March 13, 1967.

On April 3, 1967, appellant stipulated to the facts of Count I of the indictment and was found guilty of that offense upon a court trial before the Honorable Jessie W. Curtis, United States District Judge. On June 5, 1967, appellant was sentenced to a term of three years imprisonment, execution of which was suspended, placed on three years probation, and was fined \$1,000.00. Count II of the indictment was then dismissed upon motion by the government. Notice of Appeal was filed on June 5, 1967.

By stipulation filed with this court on August 21, 1967, counsel for the government and appellant's former counsel, in part stipulated, that

“the sole issue to be raised on appeal is 4411 and 4412 of Title 26, United States Code, are invalid under the Fifth Amendment to the United States Constitution. . . .”

It was further stipulated that the present matter go off calendar pending determination of the *Grosso* and *Marchetti* cases. This Honorable Court extended the time for filing appellant's opening brief to December 15, 1967. On or about December 11, 1967, present counsel was substituted for appellant's former counsel, a stipulation requesting that

“the appeal either go off calendar until the end of the next term of the Supreme Court, until the constitutional issue and question is decided, or until such time as the court may allow appellant's counsel to prepare and file an opening brief.”

was filed. On December 18, 1967, this Honorable Court denied appellant's motion and extended the time

within which to file the opening brief until February 1, 1968.

### **Constitutional Provision and Statutes Involved.**

This appeal involves the Fifth Amendment, United States Constitution; Title 26 U.S.C. §§ 4401 through 4423, 4901, 6011 and 7203.

### **Question Presented.**

“Do not the federal wagering tax statutes here involved violate the petitioner’s privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), overrule *United States v. Kahriger*, 345 U.S. 22 (1953) and *Lewis v. United States*, 348 U.S. 419 (1955)?”

### **Summary.**

The federal wagering tax laws are a well integrated series of statutes. They provide not only for registration and payment of a “special tax” prior to entering the business of gambling, but also for compulsory answers to questions concerning present and past behavior, criminal under the law of almost all states, later supplemental reporting highly incriminating in nature, and the exposing of books and records to the Internal Revenue Service.

The prior decisions of this Court, in *United States v. Kahriger*, 345 U.S. 22 (1953) and *Lewis v. United States*, 348 U.S. 419 (1955) looked almost solely to the condition precedent requirement of the special tax to the exclusion of the more obviously incriminating aspects of the legislation and Internal Revenue form. The

Court also defined the protection afforded by the privilege in an unduly restrictive manner.

The recent decision in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) virtually demands reversal here, and overruling of *Kahriger* and *Lewis*. Petitioner clearly has standing to raise the privilege without having filled out the registration form, as this area of regulation is one "permeated by criminal statutes." The approach of the *Albertson* Court in looking to the actual content of the registration form leads to the inescapable conclusion that compliance with 26 U.S.C. §§ 4411 and 4412 tends to incriminate the registrant concerning past conduct. Even if the plain language of the registration form is ignored, and registration is deemed totally prospective, required statements as to "future intent" would nonetheless tend to incriminate the taxpayer as to past acts.

The privilege, when disclosures are compelled in an area where all activity is criminal, should not be limited only to past acts. The *Kahriger* Court's reliance upon *Wigmore* in stating such a principle was misplaced. Such a rule, if exploited by cleverly drawn legislation, as is here before the Court, would lead to total emasculation of the privilege. For instance, there is no conceivable purpose served by the "condition precedent" aspect of this legislation other than subversion of the privilege—which has been singularly successful thus far.

There is no question that, even assuming existing law would be correct in a vacuum, it has in fact been used to convict people of criminal acts by use of information forced from them under threat of criminal sanction. Such a result represents an eroding away of the precious privilege; that erosion should continue no longer.

## ARGUMENT.

### I.

#### THE REGULATORY FRAMEWORK OF THE WAGERING TAX STATUTES.

Appellant presently stands convicted of having violated 26 U.S.C. Section 7201 as having “aided, abetted, counseled, induced and procured the commission of the offense alleged above.” Count I of the indictment alleges that “while defendant (Jack Vertlieb, aka, Jack Burke) was so engaged, and by reason of such activity, the defendant was required by law to pay the occupational tax (wagering) as imposed by Sections 4411 and 4412, Title 26, United States Code, to the Director of Internal Revenue for the Los Angeles District, Los Angeles, California, and willfully attempted to evade and defeat the said tax and payment thereof in violation of United States Code, Title 26, Section 7201.

Although, in *United States v. Kahriger*, 345 U.S. 22 (1953), this Court upheld the wagering tax provisions against an argument that Congress had unconstitutionally used the taxing power to regulate conduct subject solely to state control, it was conceded that the taxes involved have “a regulatory effect” and doubtless act to “discourage or deter” gambling activity. 345 U.S. 22, at 28. To understand the impact of the wagering tax provisions upon the Fifth Amendment’s privilege against self-incrimination, we must examine Chapter 35 as a single integrated unit, and view the individual statutory provisions taking into consideration their relationship with each other.

Section 4401 of Title 26 imposes an excise tax of 10 percent on all wagers (save for certain betting transactions exempted by 4402) which tax must be paid by



“each person who is engaged in the business of accepting wagers” and by “each person who conducts any wagering pool or lottery”. In addition to the excise tax on the actual wagers, Section 4411 imposes a “special tax of \$50.00 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable”. The special tax must be paid before the gambler goes into business. 26 U.S.C. §4901. Hand in hand with the “special tax” is the registration provision of 4412 requiring any person liable to pay the \$50.00 also to provide the Internal Revenue Service with certain details of his “operations”. Section 4412 has been implemented by Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry, which, after demanding an answer to the query, “Are you engaged in the business of accepting wagers on your own account?”, continues to elicit detailed information as to the people with whom the taxpayer-registrant is doing business [R. 7].<sup>1</sup>

Section 6011 of Title 26 supplies to the Secretary of the Treasury, or his delegate, the authority to require of any taxpayer, “return[s] or statement[s] according to forms and regulations prescribed” by them. Form 11-C has been so prescribed by the I.R.S. and, in addition to

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<sup>1</sup>See *United States v. Whiting*, 311 F. 2d 191 (4 Cir. 1962) where the I.R.S. refused to issue an “occupational tax stamp” when the taxpayer tendered the \$50.00 “special tax” but failed to execute a registration statement, and *United States v. Mungiole*, 233 F. 2d 205 (3 Cir. 1956) where a tender of the tax, without registration, was held to be no defense to a subsequent prosecution for failing to pay the tax.



the original registration form, the "taxpayer" must, *within 10 days after starting to do business* with a new employee or employer, file a "Supplemental" Form 11-C reporting that information. 26 C.F.R. §44.4412-1.

The *active* registration requirements of Chapter 35 far from exhaust its self-incriminating potential; Section 4423 decrees that "the books of account of any person liable for (wagering) tax . . . may be examined and inspected as frequently as may be needful to the enforcement of this chapter". It is clear that, in addition to using information obtained for the purpose of enforcing the tax, the I.R.S. feels it proper and desirable to turn over the same information to local and state law enforcement officials so that the "taxpayer" might be duly convicted on state gambling charges—it has proudly trumpeted that fact. Caplan, *The Gambling Business and Federal Taxes*, *Journal of Crime and Delinquency*, Vol. 8 (1962) pg. 697. Against this backdrop of "friendly cooperation", Chapter 35 is then neatly rounded out by Section 4422, in which Congress specifically provides that payment of the wagering tax "shall not exempt any person from any penalty provided by a law of the United States or of any state for engaging in the same activity . . ."

This court, more than a decade ago, in *United States v. Kahriger, supra* and *Lewis v. United States*, 348 U.S. 419 (1955), held that the foregoing statutory scheme was not violative of the privilege against self-incrimination; we ask the Court now to reconsider those holdings.

## II.

### KAHRIGER AND LEWIS REVISITED.

A challenge to the constitutionality of the wagering tax provisions was first brought before this Court in *United States v. Kahriger*, 345 U.S. 22 (1953). There, the major portion of the Court's opinion dealt with defendant's contention that the legislation was not a true exercise of the Congressional taxing power, but rather an illegal attempt to penalize intrastate gambling activity, the regulation of which had been constitutionally left solely to the states. When the Court did pass on to the Fifth Amendment challenge, it disposed of it rather summarily.

First, the majority expressed doubt that the accused had standing to raise the self-incrimination argument. Citing the following language from *United States v. Sullivan*, 274 U.S. 259, at 263, "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all", the Court commented that, in view of the failure of the accused to register at all, "it is difficult to see how he can now *claim the privilege*". 345 U.S. at page 32. (Emphasis added).

The Court continued, without specifically holding that defendant lacked standing to raise the self-incrimination issue, to dispose of the claim on the merits. The majority, in this regard, stated very briefly,

"Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U.S. at pages 32-3 (Emphasis added).

Two years after *Kahriger*, in *Lewis v. United States*, 348 U.S. 419 (1955), the Court expanded somewhat on its cryptic holding, in *Kahriger*, that a registrant need not “confess” to any crimes—only “fulfill certain conditions” before engaging in wagering. Reading Sections 3271 and 3290<sup>2</sup> of the 1939 Internal Revenue Code in tandem, the Court stated, “it seems clear that payment of the special \$50 tax is to be made prior to engaging in the business of accepting wagers.” 348 U.S. at page 421.

The Court pointedly stressed the word *compelled* in its definition of the scope of the Fifth Amendment guarantee. 348 U.S. at page 421. Expanding upon that theme, the majority went on to state that the fact that a gambler “may elect to pay the tax *and make the prescribed disclosures required by the Act* is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. . . . The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble.” 348 U.S. at page 422.

Passing on, finally, to appellant’s claim that the purchase and required exhibition of the \$50 stamp could furnish probable cause for issuance of a search warrant and thereby incriminate him, the Court, without citation of authority, curtly dismissed that contention based upon Lewis’ very failure to purchase the stamp and register. “His complaint is that if he had one he

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<sup>2</sup>Sections 4401 and 4901 of the 1954 Code. Section 4901 presently lays out even more specifically than its 1939 precursor the “condition precedent” aspect of the special tax provision.

might get in trouble. Since petitioner is without a stamp, he is not in a position to raise the question as to what might happen to him if he had one." 348 U.S. at page 423.

In summary, the federal wagering tax laws, as preserved from constitutional attack in *Kahriger* and *Lewis*, have stood for a decade and a half on these underpinnings:<sup>3</sup>

1. The Court's holding that an accused, not having purchased a stamp or registered, cannot, in his criminal prosecution therefor "claim the privilege" or point to what might have happened had he complied with the law.
2. The Court's emphasis on the word "compelled" in the Fifth Amendment, and its holding that payment of the tax, the prescribed registration and disclosures are strictly "a matter of . . . choice with nothing compulsory about it". 348 U.S. at page 422.
3. An implication somehow based presumably upon the literal language of the Fifth Amendment, that only *testimonial* compulsion would be violative of the privilege.
4. The holding that, because present section 26 U.S.C. 4901 requires payment of the special tax *before* entering the "business of accepting wagers",

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<sup>3</sup>In *Kahriger*, the Court was not completely clear as to whether it was considering alleged self-incrimination under State or other federal laws. The government, however, argued that any possible incrimination would solely be under state law, *United States v. Lewis*, 348 U.S. 419, 423, fn. 1, and therefore not protected by the Fifth Amendment. *United States v. Murdock*, 284 U.S. 141 (1931). To whatever extent *Murdock* was an implied basis for the *Kahriger* holding, this Court's decision in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) has undercut it.

all that is required by Chapter 35 is the disclosure of present intent to break the law, in the future, which disclosure, even if "compelled", cannot be deemed incriminating.

We contend that *Kahriger* and *Lewis*, even when decided, were based on an unduly restricted view of the privilege which this Court has called "an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized'."<sup>4</sup> *Ullman v. United States*, 350 U.S. 422, 426 (1956). In its decisions of the last decade, however, this Court has made it clear that if the wagering tax statutes "would not violate the Fifth Amendment's privilege against self-incrimination, it is hard to think of anything that would". *United States v. Lewis*, 348 U.S. at page 425 (Black, J., dissenting).

### III.

#### THE WAGERING TAX STATUTES VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

##### A. Appellant Here Has Standing to Raise the Privilege.

Relying upon *United States v. Sullivan*, 274 U.S. 259 (1927), the Court in *Kahriger* intimated that one accused of criminally having failed to register and pay the special wagering tax could not then "claim the privilege" because of his very failure to comply with the tax and registration requirements; later, in *Lewis*, the Court squarely held that petitioner could not complain of the alleged self-incriminating effects of the legislation because he had, in fact, failed to comply,

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<sup>4</sup>Griswold, *The Fifth Amendment Today* (1955), 7.



*Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) has now, however, completely undercut the “no standing” rationale of the earlier wagering tax cases.

In voiding the registration provisions of the Subversive Activities Control Act of 1950, the Court squarely met, and disposed of, the government claim, based upon *Sullivan*, that petitioners lacked standing because of their failure to register and invoke the privilege on those specific questions claimed to be incriminating. The Court pointed out that while “In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large . . . here they are directed at a highly selective group inherently suspect of criminal activities.” The claims of privilege in *Albertson*, unlike *Sullivan*, were “not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form’s questions in context might involve the petitioner in the admission of a crucial element of a crime.” 382 U.S. at page 79.

The instant case is clearly governed by *Albertson* rather than *Sullivan*. An answer to virtually any one of the questions on I.R.S. Form 11-C [R. 7] would involve an “admission of a crucial element of a crime”. Even payment of the special tax without registration at all, if that could legally be accomplished, might easily be used to incriminate, especially in a conspiracy prosecution. Surely appellant must have the same standing to challenge the validity of the wagering tax statutes, without first confessing to a crime, as did the alleged Communist Party members in *Albertson*. Cf. *Jones v. United States*, 362 U.S. 257, 258-267 (1960).

**B. The Wagering Tax Provisions Violate the Fifth Amendment Privilege Notwithstanding the Statutory Requirement That the Special Tax Be Paid Before Entering Into the Business of Accepting Wagers.**

In both *Kahriger* and *Lewis*, the Court leaned heavily on the fact that Sections 3290 and 3271 of the 1939 Code required payment of the special \$50 tax before venturing into the business of accepting wagers. Centering solely upon this single aspect of the entire group of wagering tax statutes, combined with the brief statement in *Kahriger* that the privilege applied “only to past acts, not to future acts that may or may not be committed”, 345 U.S. at page 32, led the court to the conclusion that the privilege had not been violated—that perhaps the “would be gambler . . . may have to give up gambling, but there is no constitutional right to gamble”. *United States v. Lewis*, *supra*, at 422; see also dissent of Mr. Justice Black at page 425. We submit that all the Court’s premises in the earlier cases—(1) the single minded preoccupation with the condition precedent aspect of the special tax; (2) the conclusion that the payment and registration *must* only relate to future conduct; and (3) the “rule of law” that the privilege *necessarily applies only to past acts*—were wrong.

**1. In Measuring the Constitutional Validity of the Wagering Tax Provisions the Court Must Look to the Entire Statutory Scheme.**

A reading of *Kahriger* and *Lewis* would almost leave one with the impression that the *only* thing a prospective “taxpayer” need do, under the wagering tax provisions, is pay the special tax of \$50 before starting



his "business". That of course is not at all what this package of legislation provides. Payment of the special tax is only the first requirement in a compulsory series of steps demanding that the citizens furnish the sovereign with information with which the sovereign may incriminate and incarcerate the citizen. These statutory and regulatory demands are set forth in detail, *supra*, and little would be served by repeating them here. It is a virtual impossibility, however, for a taxpayer to comply with all the statutory requirements without incriminating himself—as to past and present behavior.<sup>5</sup>

To look only to the special tax provision is to ignore the real violence done to the Fifth Amendment right by the entire legislation. As with the Subversive Activities Control Act, there is nothing in this "Act or regulation (which) permits less than literal and full compliance with the requirements of the form" or other disclosure provisions. *Albertson v. Subversive Activities Control Board*, 382 U.S. at 78. The Internal Revenue Service considers the special tax payment and the completion of Form 11-C as inseparable. In *United States v. Mungiole*, 233 F. 2d 205 (3 Cir. 1956), the accused had tendered the \$50 which was refused because, relying upon the privilege, he had refused to register. His subsequent conviction for accepting wagers without payment of the tax was affirmed by the Third Circuit, which held that tender of the tax, without registration,

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<sup>5</sup>Where a registration statute calls for information which would be incriminating as to present status or past conduct, the lower courts have had no difficulty with "standing"—and have dismissed prosecutions brought for failure to register. *Russell v. United States*, 306 F. 2d 402 (9 Cir. 1962); *Dugan v. United States*, 341 F. 2d 85 (7 Cir. 1965); *United States v. Fleish*, 227 F. Supp. 967 (E.D. Mich. 1964).

was ineffective. *Cf. United States v. Whiting*, 211 F. 2d 191 (4 Cir. 1962).

Further, if the cases dealing with the testimonial privilege are a valid guide, the payment of the tax would probably be deemed a waiver of the privilege, *Caminetti v. United States*, 242 U.S. 470, 492-5 (1917), *Raffel v. United States*, 271 U.S. 494 (1926), *Rogers v. United States*, 340 U.S. 367 (1951), thereby demanding total compliance, the privilege no longer being available, with registration under 4412, with the "open book" provision of 4423 and with the subsequent reporting required by 26 C.F.R. §44.4412-1(b) (2) and (3).

Although concededly *Albertson* dealt with compelled disclosures which could more clearly incriminate as to past acts, the approach of the court in looking to the *entire* legislation, along with forms issued pursuant to the regulations, leads us here to the same conclusion—the taxpayer-registrant is compelled by threat of criminal sanction to disclose that which inevitably would tend to incriminate him.

## **2. However Prospectively Interpreted, Payment of the Special Tax and Registration May Tend to Incriminate the Taxpayer as to Past Acts.**

We here assume, for purpose of argument, that, in measuring the wagering tax provisions against the yardstick of the Fifth Amendment privilege, it is valid, notwithstanding the clear language of the registration form and Tax Return, to consider the wagering tax requirements purely prospective.<sup>6</sup> Even if that is done,

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<sup>6</sup>Although *Kahrigier* and *Lewis* seemed to ignore the registration provision, or at least the registration form, it has been held  
(This footnote is continued on the next page)

that requirement, coupled with the criminal penalty of 26 U.S.C. 7203 for wilful failure to comply, violates the privilege against self-incrimination.

One of the most striking things about both the *Kahriger* and *Lewis* decisions is the Court's total failure to explain away some of our more significant Fifth Amendment decisions, *Counselman v. Hitchcock*, 140 U.S. 547, 564 (1892), *Blau v. United States*, 341 U.S. 159 (1950), *Hoffman v. United States*, 341 U.S. 479 (1951). In those cases, the Court clearly held that the privilege extends not only to situations where an answer in itself could support a conviction, "but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."<sup>7</sup> *Hoffman v. United States*, 341 U.S. at 486. The test there established concerning the validity of the claim of privilege was that "it need only be evident from the implications of the questions, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result". 341 U.S. at pages 485-6. Since *Hoffman*, the court has further defined this test. *Albertson* now clearly indicates that the "link-in-the-chain" test applies not only to disclosures evidentiary in themselves, but also to those things which might "at least supply investigatory ing inquiry into crime, including gambling"—a fair

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that registration also is totally "prospective". *United States v. Cefalu*, 338 F. 2d 582 (7 Cir. 1964). That is difficult to reconcile with Form 11-C and the questions therein, e.g. "Are you engaged in the business . . ." etc. At any rate, registration here inevitably leads to incrimination under the Supplementary Registration and disclosure provisions. 26 U.S.C. Sec. 4423; 26 C.F.R. §44.4412-1.

<sup>7</sup>*Murphy v. Waterfront Commission*, *supra*, has of course extended that protection to state crimes.

leads to a criminal prosecution", 382 U.S. at page 78, while in *Malloy v. Hogan*, 378 U.S. 1, 13, the Court heavily weighed, as part of the "setting", the fact that the grand jury interrogation was part of a "wide ranging inquiry into crime, including gambling"—a fair characterization, we think, of the Kefauver Committee "investigation" which gave birth to the legislation now in question. *Malloy* further emphasized that the privilege must be upheld unless it is "'perfectly clear . . . that the answer(s) cannot possibly have such tendency" to incriminate.'" 378 U.S. at 12.

We are here dealing with a "tax" on a business which is carried on in an area "permeated with criminal statutes"—where the government clearly seeks incriminating information *at least* as much as revenue—and where, under *Albertson*, *Malloy* and *Hoffman* every reasonable presumption in favor of the privilege's applicability should be entertained.

One possibly incriminating effect, as to past conduct, of the purchase of the stamp comes immediately to mind—even if we consider the annual \$50 special tax wholly prospective in nature. First, the *Kahriger* court's view of the bookmaking "business" as something entered into at a specific instant in time, after due deliberation, much as a corporation "goes public", is not true to life or experience. A man quite often may drift into bookmaking, either by way of having been a "runner" or by virtue of having, over a period of time, increased his activity from single shot or social betting to a volume which merits a "business" label. Although, in both instances he would not previously have been liable for payment of the federal tax, *United States v. Calamaro*, 354 U.S. 351 (1957), *Kahn v.*

*United States*, 251 F. 2d 160 (9 Cir. 1958), *United States v. Simon*, 241 F. 2d 308 (7 Cir. 1957), *George v. United States*, 346 F. 2d 137 (9 Cir. 1965), he doubtless had been violating state gambling laws. At the instant he becomes liable for the tax, or when he first becomes aware of the liability, he is faced with the choice of committing a federal crime by wilfully failing to pay the tax or of supplying investigatory leads which might result in conviction for his past activity in violation of state law.

State conspiracy statutes present even greater likelihood that compliance with the requirements of 4411 and 4412, however prospectively interpreted, will incriminate the taxpayer-registrant. The necessary listing of associates, even assuming Form 11-C's "Are you engaged . . ." and "Do you receive . . ." are translated somehow into the future tense, surely supports an inference that the taxpayer has *already agreed*, with those listed, to violate state law.<sup>8</sup> Since the payment of the tax, under federal law, is a condition precedent to actually going into business, payment and registration supply overt acts, thereby making the conspiracy offense complete. The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State v. Devine*, 149 Conn. 640, 649, 183 A. 2d 612, 616 (1962), and need not be criminal acts in themselves. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). The compulsory tax and registration does more than

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<sup>8</sup>One court has held, in affirming a conspiracy conviction based upon the wagering tax stamp, "It will not be gainsaid that common sense dictates the conclusion that these parties would not have gone to the trouble and expense complying with this federal law unless they fully intended to engage in the activity of which the tax was levied and paid." *Acklen v. Tennessee*, 267 S.W. 2d 101, 104 (Tenn. 1954).



tend to incriminate the registrant—it can convict him, of prior criminal acts, without any other evidence. At least one state court has so held. *Acklen v. Tennessee*, 267 S.W. 2d 101 (Tenn. 1954).

3. **Where Disclosures Are Compelled in an Area in Which the Specific Endeavor Is Illegal, the Privilege Should Apply Whether Registration Is Required Before or After the Criminal Act.**

The heart of the *Kahriger* opinion is the Court's flat statement, relying only upon Professor Wigmore,<sup>9</sup> that the privilege relates "only to past acts, not to future acts that may or may not be committed". 345 U.S. at 32. We submit that nothing in Wigmore nor in the cases he relied upon justifies the application of the usual "record keeping" rules to the legislation here challenged; further, application of the *Kahriger* generalization "would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation".<sup>10</sup> Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949).

The source, in Wigmore, of the Court's flat generalization concerning past and future acts is the Professor's discussion of statutes requiring certain records to

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<sup>9</sup>8 Wigmore (3d Ed., 1940), § 2259(c).

<sup>10</sup>"Under the *Kahriger* rationale, the potential role of required information in the area of criminal prosecution appears almost unlimited. Assume, for example, the fancied possibility of an excise tax laid on the occupation of burglary, coupled with a registration statement requiring disclosure of the principle place of business—that is, where tools are kept and goods received or stored. These statements relating to future intent could, consistently with the *Kahriger* decision, provide prosecutors with a file of 'non-incriminatory' confessions between the fact which would be admissible into evidence at trial."

65 Colum. L. Rev. 681, 689, *Required Information and The Privilege Against Self Incrimination* (1965).

be kept. The examples used were the “druggist’s report of liquor sales, or a pawnbroker’s record of pledges”, 8 Wigmore at page 349, both *legal businesses*. It is clear that Wigmore’s feeling that the privilege was inapplicable was largely based upon the legality of the “generic class of acts”, 8 Wigmore at page 349, where “it is certain that only an occasional one will involve criminality”. 8 Wigmore at page 352. Wigmore’s “rule” would appear only to apply to legislation “*which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in the future be criminal . . .*” 8 Wigmore at page 349 (Emphasis in source).

Unlike the druggist and the pawnbroker, *all* of a gambler’s business is illegal—at least in Connecticut. Any and all further acts will necessarily be criminal. Any compelled disclosure will incriminate. In a setting such as this one, the rules governing pawnbrokers are totally inapposite.

Of great significance here is the reason, or lack thereof, for the requirement of prior payment and registration. This clearly is not a licensing statute where the government, as with I.C.C. franchises, seeks to regulate the number of licensees or the areas in which they work—nor, like most state liquor licensing schemes, is the sovereign attempting to maintain minimum standards in its liquor outlets and permittees. Here, you simply pay the \$50 tax, register, and receive your stamp—there are no other requirements for entering the business. The condition precedent requirement was either a Congressional accident, totally unrelated to the stated legislative purpose of raising revenue, or, much more likely, a deliberate attempt to subvert the privilege



against self-incrimination.<sup>11</sup> To grant success to the sovereign by use of such a gimmick hardly maintains a "fair-state-individual balance". *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). Just as *Albertson* drew a meaningful distinction, where the privilege was concerned, between completion of the basically innocuous federal income tax return and the registration forms for Communists, here too we must differentiate between druggists and gamblers.

### C. Kahriger and Lewis Run Counter to Our Basic Sense of Justice Embodied in the Fifth Amendment Privilege.

In more than a century and a half of constitutional interpretation, this Court, in its decisions defining the reach of the Fifth Amendment privilege against self-incrimination, has "groped for the proper scope of governmental power over the citizen". *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). As compulsion of one set or another by the sovereign has manifested itself in increasingly sophisticated forms the privilege, reflecting "our most noble aspirations", *Murphy v. Waterfront Commission*, 378 U.S. at 55, has blossomed forth as a protection against "subtle encroachments on individual liberty". *Miranda v. Arizona*, 384 U.S. at 460. While the Court's defining of the privilege "as broad[ly] as the mischief against which it seeks to guard", *Counselman v. Hitchcock*, 142 U.S. 547, 562, has perhaps been most dramatic in the confession cases,<sup>12</sup> there

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<sup>11</sup>Professor Morgan's "ingeniously drawn legislation", 34 Minn. L. Rev. 1 (1949).

<sup>12</sup>*Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Haynes v. Washington*, 373 U.S. 503 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

have been other "subtle encroachments" which have recently been met.

One of the most important of these was the discarding of the so-called "dual sovereignty" rule of *United States v. Murdock*, *supra*, *Knapp v. Schweitzer*, 357 U.S. 371 (1958), and *Feldman v. United States*, 322 U.S. 487 (1944). In *Murphy v. Waterfront Commission*, *supra*, pointing to the inherent unfairness of an accused being "whipsawed" into incriminating himself under state or federal law, especially "in our age of 'cooperative federalism'", the Court held that answers compelled in a state investigation might not be used in connection with a federal prosecution. 322 U.S. at 55-6, 79-80.

Murphy, however, has not totally done away with the "whipsaw". That registration and payment of the gambling tax not only incriminates, but is fully intended by the sovereign to incriminate, is amply demonstrated by the following statement of Mortimer M. Caplan, former Commissioner of Internal Revenue, writing in 1962 for the *Journal of Crime and Delinquency*, Vol. 8, in an article titled *The Gambling Business and Federal Taxes*:

"The enforcement of local anti-gambling laws is a function of police powers reserved to the states by the Tenth Amendment. However, the Federal government can assist these local agencies to enforce such laws more effectively in a number of ways. Supplying information that is helpful to local law-enforcement is one very important aid. *As an example, the Internal Revenue Service makes available to those agencies the names and addresses of those who have paid wagering taxes.*

. . .

The District Director of Internal Revenue is required by law to maintain for public inspection an alphabetical listing of the names of all persons who have paid certain "special taxes". This includes both the excise and the occupational taxes on wagering.

*The dilemma of the bookmaker is apparent. If he registers and pays the wagering taxes, he is generating evidence of his gambling activities—evidence that is available to local authorities. If he does not register, he exposes himself to the sanctions and penalties contained in the Federal Wagering tax laws."* page 697 (Emphasis added).

"Non-incriminatory" registration disclosures compelled by threat of criminal prosecution have been and are being used to obtain convictions for other criminal offenses, both state and federal, *Irvine v. California*, 347 U.S. 128 (1954); *State v. Curry*, 92 Ohio App. 1, 109 N.E. 2d 298 (1952); *Commonwealth v. Fiorini*, 202 Pa. Super. 88, 195 A. 2d 119 (1963); *Acklen v. Tennessee*, 267 S.W. 2d 101 (Tenn. 1963); *State v. Mills*, 229 La. 758, 86 So. 2d 895 (1956); *United States v. Zizzo*, 338 F. 2d 577 (7 Cir. 1964).

Regardless of whether, technically, this legislation looks to the past or future, it would be difficult to explain to someone convicted through use of his own registration statement that he had not been "compelled" to bear witness against himself.<sup>13</sup> A result similar to that reached in *Kahriger* and *Lewis* may be duplicated

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<sup>13</sup>The literal use of "compelled" by the Court in *Lewis* is unjustified. In *Griffin v. California*, 380 U.S. 609 (1965), it was held that the making of the "assertion [of the privilege] costly", was an unconstitutional "compelling" proscribed by the Fifth Amendment.

by legislatures at will by use of what is essentially a “gimmick” of legislation. The privilege should surely rise higher than congressional ingenuity; if it does not, we are all in trouble.

It must appear obvious that in the event the appellant, Freedman, is required to register, such registration would serve as an incriminating admission of gambling activities. And in this connection we quote from the Honorable James R. Browning, Circuit Judge, Ninth Circuit, in the case of *United States of America v. Carl Cohen*, decided December 19, 1967, in which a judgment of the United States District Court for the District of Nevada was affirmed, quashing a Summons. Judge Browning, in part, held as follows:

The Fifth Amendment commands that “no person shall be compelled to be a witness against himself.” It is obvious that the government seeks to compel Cohen to produce the described documents without regard to his wishes. It has been the law for at least eighty years that compelled production of documents falls within the ambit of privilege. It is conceded that the documents here might be used by the government against Cohen in a future criminal proceeding. Moreover, since the documents themselves are incriminating, their very production pursuant to their description in the summons would constitute an incriminating admission of their identity and authenticity. Clearly, recognition of the privilege in this case would clearly serve most of the purposes of the privilege, recently restated in *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual" to a private enclave where he may lead a private life ". . . our distrust of self-deprecatory statements, and our realization that the privilege, while sometimes "a shelter to the guilty" is often "a protection for the innocent."

### Conclusion.

This Court has been scrupulous in protecting the citizen from governmental overreaching destructive of a "fair state-individual balance" in the criminal process; always, especially in recent years, has it jealously guarded from erosion—by legislature, judge, prosecutor or policeman—the Fifth Amendment privilege against self-incrimination, "the essential mainstay of our adversary system". *Miranda v. Arizona*, 384 U.S. at 460. The decisions in *Kahriger* and *Lewis* stand out strikingly, in the recent history of the Court, as exceptions both in their narrow unrealistic approach to the legislation in question and in the restrictive scope there accorded the privilege. We ask the Court now to over-

rule both cases and to recognize the real violence done the privilege by the wagering tax. We ask that the judgment below be reversed and the indictment ordered dismissed.

Respectfully submitted,

SARNOFF & LIEBERMAN,

By WILLIAM M. SARNOFF,

*Attorneys for Appellant.*

*Of Counsel:*

LAURENCE M. SARNOFF.



### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM M. SARNOFF





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IN THE  
UNITED STATES COURT  
OF APPEALS

FOR THE NINTH CIRCUIT

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BRYAN ALAPERET and LAURIE ALAPERET,  
by KAREN ALAPERET, as Guardian ad Litem,  
and KAREN ALAPERET,  
*Plaintiffs-Appellants,*

vs.

~~Civil Action No. 725~~

W. D. PHELPS, d/b/a PHELPS PUMP  
AND EQUIPMENT COMPANY,  
*Defendant-Appellee.*

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APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF NEVADA

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BRIEF FOR PLAINTIFFS-APPELLANTS

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FILED

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## JURISDICTIONAL STATEMENT

This is an appeal by the plaintiffs from a summary judgment in defendant's favor entered in the Federal District Court for the State of Nevada on May 12, 1967. Notice of appeal was entered and filed, with Appellant's Cost Bond, on June 9, 1967 in that court.

Jurisdiction in the District Court to hear this action for the wrongful death of plaintiffs' decedent is properly predicated on 28 U.S.C. § 1332(a), the plaintiffs being citizens and residents of the State of Michigan and the defendant being a citizen and resident of the State of Nevada at the time this action commenced. The amount in controversy is \$500,000.00.

Jurisdiction in this Court of Appeals to review the summary judgment entered in the Federal District Court for the State of Nevada is properly predicated upon 28 U.S.C. §§ 1291, 1294.

## STATEMENT OF THE CASE

This is a diversity action for wrongful death with its substantive basis lying in the Nevada Industrial Insurance Act, N.R.S. 616.560. It is a "third party" action.

In their complaint, plaintiffs allege that the defendant, through his employees, negligently introduced oxygen into a well casing in which plaintiffs' decedent was welding, causing his death four months later from the burns suffered when the oxygen exploded. The plaintiffs are the wife and the two minor children of the deceased, Douglas Alaparet. The defendant, a well-drilling contractor, denies any negligence in this occurrence. The questions of liability and damages are not now before this court.

After issue had been joined, the defendant moved for summary judgment urging much the same grounds as in his second motion for summary judgment. The trial court denied the first motion believing a jury question to be involved (14a). The defendant then made a second motion for summary judgment which was granted. The theory upon which this second motion was granted was that by vir-

tue of N.R.S. 616.085 subcontractors' employees are barred from instituting "third party" actions against their principal contractor, that under N.R.S. 616.115 subcontractors are deemed to include independent contractors; and therefore, whether Harlan McNair was a subcontractor or an independent contractor, his employee, Douglas Alaparet, would be barred from recovery against the defendant in a "third party" action (13a-14a). Simply stated, Douglas Alaparet was adjudged to have been a "statutory employee" of the defendant.

The sole question raised by this appeal is whether or not Douglas Alaparet was a "statutory employee" of the defendant at the time his fatal injury was incurred through the alleged negligence of the defendant's employees. If so, the summary judgment was properly given. If not, then this action should proceed to the merits. It is plaintiffs' position that application of the *correct* legal principles to the undisputed facts surrounding Douglas Alaparet's employment establishes that Douglas Alaparet was not an employee of the defendant.

At some time prior to Alaparet's fatal injury, the defendant had entered into a contract with the Las Vegas Water District whereby defendant was to drill a well upon property over which the Water District had an easement (15a, 20a-21a, 22a-24a). The well was to be constructed of 20" I.D. casing sunk to a depth of 100' (23a). The method of sinking this casing appears to have been as follows: A section of the casing was partially lowered into the ground, then another section was placed on top of this section. The two sections were then welded together by means of a continuous, electric weld around the outside of the joint where the two sections met. The newly welded sections were then lowered into the ground until the top of the second section was just above the ground. A third section was then placed on top of the second section and the same welding and lowering operation was repeated. The entire welding operation took place two to four feet *above* the ground. At no time was it necessary to go underground to weld or to weld on the inside of the casings in order to connect the sections of casing together. The duties of the

defendant's only welder were solely confined to this surface operation and other miscellaneous surface repairs on the drilling rig (3a-5a, 9a).

On November 29, 1964, one of the defendant's employees noticed an improper movement of the casings as they were being lowered into the ground. By means of a mirror, he was able to discern a break and fracture in the well casing (20a). The decision as to how the fracture was to be repaired was left to the defendant's field supervisor who determined that the fracture would have to be repaired by a *specialist* (10a). The key reason for bringing in a specialist was that the welding needed to repair the fracture was completely different from the welding used to initially connect the sections of casing together and *that this type of welding was beyond the ability and scope of employment of the defendant's one welder who was directly employed by him* (5a-6a, 10a, 11a, 12a, 16a (Q21), 21a).

All of defendant's employees indicated that they had never before observed or heard of a fracture in a well casing (1a, 10a, 12a). It might also be noted that the one welder employed by the defendant had had no experience in specialized welding, had previously worked for a small welding shop doing general welding (repair of boat trailers) in contrast to Alaparet who worked for a shop doing specialized repairs, had no experience in welding separated materials of the type which had to be connected in order to repair the fracture, or of welding casing fractures, nor had he any experience in welding inside a casing or inside similar structures, such as large culverts (5a-7a). The defendant's supervisor, therefore, had good reason to direct his driller "to locate a specialist, someone who could weld this fracture", which was inside the casing and 24 feet underground (11a).

The driller then contacted Harlan McNair, the owner of the General Machine Shop, with whom the defendant had never done business before (9a). Mr. McNair said his shop could do the work if the repair project was acceptable to Douglas Alaparet, his employee. The defendant's employees showed Mr. McNair and Alaparet a sketch

of the problem and they accepted the job (7a-9a). Neither the defendant nor his employees set out any method by which the repair was to be done (8a), nor were any plans or specifications given McNair or Alaparet (16a). According to the defendant, McNair and Alaparet were in full charge of the repair project, the decedent or McNair supplied all the special welding equipment needed, and the defendant's employees' only connection with the repair, other than the disputed question of who regulated the oxygen, was to lower Alaparet into the casing on a sling which the decedent had supplied himself (15a-17a).

Following the fatal injury to Alaparet, McNair billed the defendant \$20.00 for the repair job, which was apparently the contract price for the job and which defendant paid (17a). After the injury to Alaparet, the defendant had to commence drilling an entirely new well, apparently because the fracture could not be repaired (17a-18a, 21a-22a).

### SPECIFICATION OF ERROR UPON WHICH APPELLANTS RELY

The trial court erred in granting a summary judgment in favor of the defendant on the ground that plaintiffs' decedent was a statutory employee of the defendant: said ground being erroneous in that decedent's common law employer, Harlan McNair, was not a subcontractor to the defendant or, in the alternative, even if Harlan McNair, decedent's common law employer, were a subcontractor to the defendant, the decedent's statutory employment was both "casual" and not in the course of the defendant's trade, business, profession or occupation; excluding decedent, in either case, from the class of defendant's employees under the applicable Nevada statutes.

### SUMMARY OF THE ARGUMENT

Nevada forecloses "third party" actions against employers and persons in the "same employ". Douglas Alaparet was clearly the common law employee of Harlan



McNair. He was just as clearly not the common law employee of the defendant. Solely on the basis of common law employment, this action could not be brought against Harlan McNair, but could be brought against the defendant.

However, Nevada has a "contractor-under" statute which creates a "statutory" employment between employees of a subcontractor and the principal contractor of the project upon which they work. Hence, with one important exception, employees of a subcontractor may not bring a "third party" action against their principal regardless of his negligence toward them.

Under Nevada law, the term "employee" excludes "any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." While this exclusionary provision has not been construed by the courts of Nevada, similar provisions have been consistently construed to exclude persons who would be statutory employees, but for the operation of the "employee excludes" provisions. Persons, so excluded, may bring "third party" actions.

Assuming that the defendant was the principal contractor and Harlan McNair was a subcontractor on the repair project, the fact that Douglas Alaparet's employment was both "casual" and "not in the course of" would exclude him from being defendant's employee and permit his survivors to bring the present action.

The "casual" nature of Alaparet's employment is clearly evidenced by the fact that the total contract price was for only \$20.00. Under Nevada law, employment is "casual" when the total *labor* cost is less than \$100.00 and the total working time less than 10 days. Its "casual" nature is also fortified by evidence that the work was not a regular facet of defendant's operation and, in fact, had never before been needed in defendant's business of well drilling, nor apparently in the businesses of other well drillers similarly situated. In addition, the defendant had never before contracted with Harlan McNair for any sort of work and admitted that the repair of the fracture in the well casing was beyond the ability and scope of employment of his own employees.

The test as to whether work comes within the course of the business of the alleged employer hinges on whether the work is ordinarily done through employees of the alleged employer or of employers in a similar business. Defendant's business was drilling wells, not repairing fractures in well casings. On the contrary, the latter was closely connected with Harlan McNair's business of specialized welding. Defendant admitted that the repair work was outside of the scope of employment of the one welder he employed. This admission is substantiated by the experience and qualifications of the defendant's welder and the fact that the fracture was unprecedented. Defendant further admitted that specialized welding equipment, supplied by Harlan McNair, was needed for the repair. Specialized repairs, of the sort which the employer is not equipped to handle through his own force, have consistently been held to be outside the course of the employer's business. Moreover, it makes no difference whether the specialized repair is useful, necessary, or even absolutely indispensable to the employer's business, so long as the employer's regular employees do not ordinarily do such work.

Therefore, even if the defendant is considered to be a principal contractor by virtue of his contract to drill the well, Douglas Alaparet could not be considered his employee because of the exclusionary provision in the Nevada Industrial Insurance Act argued above.

If defendant was engaged in the business of repairing well fractures and was a principal contractor in relation to that particular business, an employee of a subcontractor could not recover from him in a "third party" action, Nevada apparently allows a person to engage temporarily in a business which is different from that person's primary business and be principal contractor in that business. It could be argued that defendant was temporarily engaged in the business of specialized welding, in addition to his permanent business of well drilling. Under Nevada law, the question then becomes whether the defendant was also a principal contractor in the temporary business or whether he was merely a person "having the work done". If the defendant is regarded as having tempo-

rarily assumed the business of specialized welding, he is clearly just a person "having the work done" since he had no previous experience with this type of specialized welding, took none or an inconsequential part in the work through employees directly hired by him, and did not let out other contracts for different phases of the specific project of repairing the fracture. A person "having the work done" is liable in a "third party" action since he cannot be a principal contractor and "statutory employer" to employees of subcontractors and independent contractors who are doing the work.

The defendant is caught on the horns of a dilemma. If he contends that, at the time of Alaparet's injury, he was engaged in the business of well drilling, there is no question that he was the principal contractor on the project to drill the well. However, even if McNair is assumed to be a subcontractor on that project, Alaparet could not be defendant's employee since his employment was both "casual" and not in the course of defendant's business of well drilling. If, on the other hand, defendant contends that the repair project was a business in which he was temporarily engaged, he escapes the above argument, but loses his principal contractor status in regard to that repair when it is looked at as being independent of the overall project of well drilling.

Although plaintiffs to this point have accepted defendant's argument that being an independent contractor makes one a subcontractor under Nevada law, as that equation does not affect the above arguments, it is rather doubtful that this follows the law of Nevada. Dicta in some cases aside, there is clear Nevada authority for the proposition that "independent contractors" are "subcontractors" only "when acting as subcontractors". Under the usual definition of subcontractor, this term not being defined in Nevada, Harlan McNair could not have been a subcontractor. Hence, Alaparet could not have been a statutory employee of the defendant.

Defendant will also argue that Nevada is a "common employment" state although this too has no bearing on the above arguments. As an aside, it should be noted that this argument is belied by the clear language of the Nevada



Act which establishes Nevada to be a "same employ" state, which is quite a different thing. However, even if Nevada were a "common employment" state, it would be necessary for the defendant to have shown that McNair entered into a contract to do part of the defendant's work and that the work done by McNair was not "merely ancillary and incidental" to the defendant's business in order for Alaparet to be considered defendant's employee. Neither of these conditions has been met and, in fact, the evidence shows the contrary.

A Court of Appeals may enter summary judgment for the appellant even though he did not move therefor. Plaintiffs suggest that the trial court took an incorrect view of the applicable law ruling the question of whether or not Douglas Alaparet was an employee of the defendant. Under a correct view of the law, the undisputed facts surrounding Alaparet's employment show that he could not have been an employee of the defendant, statutory or otherwise, at the time the fatal injury occurred.

Plaintiffs respectfully request this court to reverse the summary judgment with directions to enter judgment for the plaintiff's on the question of their decedent's employment status with the defendant and to proceed to the merits of their action.

## ARGUMENT

### Nevada Is A "Same Employ" State With A "Contractor-Under" Statute

It is well established that an employee may not sue his employer in a common law action for injuries negligently inflicted by the employer if the employer is insured under a workmen's compensation act. It is equally well established that an employee may sue a stranger in a common law action for injuries negligently inflicted by him. In the first case, the employee is left exclusively to his remedies under the compensation act. In the second case, he may accept compensation benefits and then sue the wrong-doing stranger at common law with subrogation rights given the compensation carrier for the bene-

fits already paid. The latter situation, a "third party" action, is guaranteed by statute or by the common law in all states. See *Larson, Workman's Compensation* § 71 (1961).

The present diversity action is a "third party" action whose substantive base is N.R.S. 616.560, which provides in pertinent part:

"When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which injury was caused under circumstances creating a legal liability in some person, *other than the employer or a person in the same employ*, to pay damages in respect thereof:

"(a cause of action is established in the employee, or his survivors, against the third party wrongdoer with subrogation rights in the Nevada Industrial Commission for any compensation already paid to that employee or to his survivors)".

"Third party" statutes fall into four classes depending upon which persons are excluded from the classification of "third parties". Professor Larson sets out the variants as follows:

- (1) the employer alone;
- (2) *the employer and persons in the same employ*;
- (3) the employer, persons in the same employ, and all contractors and their employees engaged upon a "common employment" or upon a "related purpose";
- (4) all persons subject to the state's compensation system.

*Larson, op. cit. supra*, at § 72.00. The majority of states grant immunity only to the employer, but a sizable number also give immunity to persons in the same employ. *Id.* at §§ 72.10, 72.20.

A typical statute in this latter category is that of New York, Workman Compensation Act. Section 29(6),

“The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee, or in the case of his death his decedents, when such employee is injured or killed by the negligence or wrong of *another in the same employ.*”

Even more in point with the above Nevada statute is that of Michigan, M.S.A. 17.189, which reads in pertinent part:

“Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person *in the same employ* or the employer to pay damages in respect thereof (the employee may enforce this liability, etc.)”

Comparison of these statutes with the Nevada “third party” statute, N.R.S. 616.560, certainly supports the conclusion that Nevada is a “same employ” state. The thrust of this is that “third party” actions are more favored under Nevada Statute than in the states which have broadened the sweep of their compensation coverage beyond the “same employ” concept.

Only a few states have done so. Professor Larson lists the “common employment” states as Massachusetts, Minnesota, Oregon and probably Florida. *Larson, op. cit. supra*, at § 72.30. He lists the “complete immunity” states as Alabama, Illinois, and Washington. *Id.* at § 72.40. It might be noted that those states which go beyond the “same employ” concept have done so only after express judicial or legislative pronouncements to that effect. No state has stretched a “same employ” statute into a “common employment” or “complete immunity” rule. *Ibid.*

The effect of the Nevada “same employ” doctrine may be illustrated by the facts of the present case. These facts indicate that Douglas Alaparet was not a common law employee of the defendant. For example, there was no control over his activities as he was working on the casing repair

(8a, 15a-17a). Defendant admitted this fact and stated that McNair and Alaparet were in complete charge of the repair at the well site (15a-16a).

In *Nevada Industrial Commission v. Bibb*, 78 Nev. 377, 374 P.2d 531 (1962), the court said,

“In determining whether an individual is an employee entitled to compensation under workmen’s compensation acts, one test is that of control. If he is subject to the control, supervision, or authority of the person for whom work is done, his status is that of an employee within the meaning of such statutes.”

The court, after touching on the “statutory employee” problem which will be considered later, went on to lay out several factors governing common law employment,

“. . . (the employer), among other things, controlled Bibb’s hours of work, his place of work, the nature of his work, the amount of work to be done, the right to discharge without liability, the furnishing of supplies, . . . and the compensation Bibb was to receive.”

The record clearly shows that the above indicia of common law employment were completely absent between Douglas Alaparet and the defendant. Hence, if all Nevada looked at was the presence or absence of common law employment to determine whether a “third party” action could be brought, the defendant could certainly be liable in this “third party” action.

However, Nevada, like most other states, has broadened the concept of common law employment in cases where a principal-subcontractor relationship exists. The effect of this “statutory employment” is to make employees of the subcontractor employees of the principal contractor at the same time. This bars “third party” actions against the principal contractor even in those states which extend “third party” immunity to the employer alone. Plaintiffs take the position that there are no more indicia of “statutory employment” between Douglas Alaparet and the



defendant than there are indicia of common law employment.

Forty-two states, including Nevada, have "statutory employer" or "contractor-under" statutes. See *Larson, op. cit. supra*, at §§ 49, 72.31 (1961). Generally, these states hold a general contractor liable for compensation to the employee of an uninsured subcontractor under him, who is doing work *which is part of the business, trade, or occupation of the principal contractor*. *Ibid*. The latter point is very important to this case as it frequently permits "third party" actions to proceed where there would otherwise be "statutory employment", but for the requirement that the work be part of the principal's business. In any event, the basic theory of the "contractor-under" statutes is to protect an employee of an uninsured subcontractor and make it impossible for an unscrupulous principal contractor to escape liability for compensation by "farming out" work ordinarily done by the principal to irresponsible subcontractors. *Ibid*; see also *Simon Service v. Mitchell*, 73 Nev. 9, 15-16, 307 P.2d 110 (1957). Interestingly enough, the purpose of the "statutory employment" statutes is not necessarily to curb "third party" actions, but their use often does so; statutory employer-employee being linked to common law employer-employee.

Nevada's "contractor-under" statute actually encompasses several provisions of the Nevada Industrial Insurance Act. The "contractor-under" statute begins with the general provision that employers shall provide compensation for injuries sustained by an employee arising out of and in the course of his employment, said compensation being an exclusive remedy. N.R.S. 616.270. The key word is "employee". The statute then continues with N.R.S. 616.085 which states:

"Subcontractors and their *employees* shall be deemed to be *employees* of the principal contractor."

These two provisions lie at the base of the Nevada "contractor-under" statute. To this basic statute must be added five other statutory provisions. The first two appear to

broaden the class of persons considered to be "statutory employees".

N.R.S. 616.115:

" 'Subcontractors' shall include independent contractors."

N.R.S. 616.105:

" 'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

The last three provisions, on the other hand, restrict and limit the class of persons who fall within the classification of "statutory employees".

N.R.S. 616.060:

" 'Employee' excludes: 1. Any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

N.R.S. 616.030:

" 'Casual' refers only to employment where the work contemplated is to be completed in not exceeding 10 working days, without regard to the number of men employed, and where the total labor cost of such work is less than \$100."

N.R.S. 616.120:

" 'Trade, business, profession or occupation of his employer' includes all services tending toward the preservation, maintenance, or operation of the business, business premises, or business property of the employer."

Plaintiffs suggest that the interrelationship of the above statutory provisions was not adequately explored by the trial court when it accepted defendant's over literal and simplistic argument in favor of his second motion for summary judgment. They urge that a more reflective look at the present factual situation will show that Douglas Alaparet was not a "statutory employee" of the defendant.

### **The Rationale Behind The Summary Judgment Was Incomplete**

In his successful argument below, the defendant relied solely on N.R.S. 616.085 and 616.115. The trial court accepted the argument that whether or not Harlan McNair was an independent contractor he was, by virtue of the above two provisions, vicariously a subcontractor whose employees were also employees of the principal contractor, the defendant (13a-14a). Although the plaintiffs do not concede the correctness of the above argument, particularly under one approach to the factual situation in this case; for the purpose of argument on plaintiffs' first point, it may be assumed to be. That is, assuming the defendant to be the principal contractor and Harlan McNair to be a subcontractor, albeit vicariously, the summary judgment was still improperly given because Douglas Alaparet could not have been an employee of the defendant.

As quoted above, N.R.S. 616.060 provides:

" 'Employee' excludes: 1. Any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

Like most other provisions in the Nevada Industrial Insurance Act, the Nevada courts have found it unnecessary to construe the above provision. Therefore, it is necessary to go to other jurisdictions having similar provisions to find its meaning and apply it to the present case. This type of exclusionary provision has been held to apply to both "statutory" and common law employment. *Benbow v. Edmund High School*, 67 S.E.2d 680 (S.C. 1951), and cases cited therein.



## Douglas Alaparet's Relationship With The Defendant Was A "Casual" Employment

N.R.S. 616.030, *supra*, sets out two conditions for casual employment. First, that the job takes less than 10 working days. Second, that it costs less than \$100.00 in labor costs. These conditions being met, the clear language of the statute demands that the employment be "casual".

The defendant admitted that the *total* price paid Harlan McNair for the job was \$20.00 (17a, Q41). There is no evidence in the record that the entire contract price was to exceed this \$20.00. Since this price is much less than the \$100.00 in *labor* costs allowable in "casual" employment under Nevada law, the first condition of "casual" employment has certainly been met in the present case.

The second condition, that the job should not exceed 10 working days, follows as a logical deduction from the \$20.00 contract price paid by the defendant. Plaintiffs submit that no jury of reasonable men could find that any welder, much less a specialized welder, would work for less than \$2.00 *a day*. Because of the low contract price, the length of the repair work could not have been intended to extend past a few hours. Hence, the two conditions for casual employment have been met.

Another aspect of "casual" employment was considered in *Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir 1939), where a once a year repair job was held to be "casual". In the present case, the defendant's employees had never before seen or heard of a well casing fracture, much less its repair (1a, 10a, 12a). From *Cardillo's* viewpoint, the present repair job seems even less than "casual".

Simply stated, the purpose of these "casual" employment provisions is, in the words of the *Benbow* case, *supra*,

". . . to narrow or to withdraw the application of the broader terms of the statute from these 'casual' employments, which are more or less incidental to the life of everybody."

The statute in *Benbow v. Edmund High School*, 67 S.E.2d 680 (S.C. 1951), follows word-for-word with the Nevada

provision. Under the S.C. Code (1942), 7035-2(b), "employee" excludes:

"... persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

The facts of *Benbow* parallel those of the present case. An employee of an electrical contractor was sent to the school to repair a light fixture. The school had its own maintenance crew, but none of these employees were able to perform the repair job. The employee was injured and sought compensation from the school, his own employer being uninsured. The court stated that the record did not disclose the amount of time which would have been required to repair the light, but felt that the fact that the bill amounted to only \$22.50 took care of this deficiency. On these facts, which were undisputed, the court held the employment to be "casual" and exonerated the school from compensation liability. If a "third party" action had been brought, of course, the school could have been liable. It might be added that the contractor in *Benbow* had occasionally been hired by the school to do similar repairs in the past. In the present case, the "casualness" of the employment is even more forcefully emphasized by the fact that the defendant had had no prior dealings with Harlan McNair before the fracture requiring repair occurred.

The court in *Benbow* noted that,

"It is less difficult to recognize such 'casual' employment when it is presented in a given case than it is to lay down a rule or definition that can be decisive of every case."

It is submitted that the present case presents such a recognizable example of "casual" employment that no reasonable man could find otherwise. The question then becomes whether or not Douglas Alaparet's employment was in the course of the defendant's business.

**Douglas Alaparet's Relationship With The Defendant  
Was Not In The Course Of The Trade, Business,  
Profession Or Occupation Of The Latter**

A case which is strikingly analogous to the present case from the standpoint of the legal principles involved is *Best v. J. & B. Drilling Co.*, 152 So.2d 119 (La. App. 1963). The question in *Best* turned on whether the work done by an employee of a mechanical contractor for a well drilling company was in the course of the trade, business or occupation of the drilling company. It might be noted that the Louisiana statute, which controlled the *Best* case, makes no distinction between independent contractors or sub-contractors. In Louisiana, there are apparently only two classes of parties to contracts, like that in the present case, the contractee (designated the "principal") and the "contractor". In effect, this was defendant's argument as to the construction of Nevada law and the interrelationship of N.R.S. 616.085 and 616.115. Therefore, because of the express terms of the Louisiana statute, the *Best* court was at the same point, to begin with, as the trial court in the present case was when the latter accepted defendant's argument that "independent contractor" equals "sub-contractor" and granted summary judgment. The *Best* case shows that the present trial court should have looked further into the applicable law. In holding that the employee *was* in the course of the trade, etc., in the *Best* case, that court considered several factors which should be dispositive of the present case.

The court first noted that the cause of the repair job, a broken air compressor, had been repaired by Brown, the injured employee's employer, on two occasions in the past. As noted above, the defendant had never before called upon Harlan McNair for a repair job (9a), and in fact, had no need for a repair job on a casing fracture as such fractures were unprecedented in his line of business (1a, 10a, 12a).

The second factor noted by the court was the trial court's finding that J. & B. and others in the same trade or business in the area repaired their own compressors through their own employees. In the present case, on the contrary, there is overwhelming evidence that the repair job which

led to Douglas Alaparet's death was not one which was even contemplated by the defendant or other well drillers. As referred to above, the fracture was a case of first impression. In addition, the defendant admitted that special welding equipment was needed to perform the work (16a, Q12), which had to be supplied by Harlan McNair (19a). In short, distinguishing *Best* on the facts, there is no evidence in the present case that it was the general practice of well drillers in the Las Vegas area to have their own employees repair well casing fractures or to possess the equipment needed to do so.

The third factor considered by the *Best* court was whether the work done by Best on the project was work which could have been done by the well-driller's own employees. The court found the particular work which Best was doing at the time of the injury (checking and adjustment of the compressor *after* its repair) was no different than the work which the driller's own employees usually did. In the present case, the record is replete with references to the fact that the one welder employed by the defendant was incapable of doing the job for which Alaparet was hired (5a-6a, 10a-11a, 12, 20a-21a). In fact, the defendant has admitted that the repair work was outside the regular course of employment of his own employees (16a):

"Q21. How many welders are in the employ of your company and why did you contract with General Machine Company rather than having one of your own welders perform the work?

A. One welder. *The work to be performed was out of his line of work.*"

*Best* illustrates the evidence which will support a finding that the repair job in question is one which is within the course of the business of the contractee. The present case contains no such evidence, but on the contrary, presents evidence which clearly shows that the work done by Douglas Alaparet was not within the course of defendant's business.

The present case can also be distinguished from *Stansbury v. Magnolia Petroleum Co.*, 91 So.2d 917 (La. App. 1957), which was a case where an outside welder was



brought in to effect repairs on the oil company's derricks. The court said,

"We know, as a fact, that all the major oil companies of this area engage welders and other workmen of a similar nature as their regular employees. We also know, as a fact, that any company owning oil derricks requires the services of welders for the maintenance and repair of their derricks. And for such maintenance and repair, they have welders in their regular employment."

The present defendant employed one welder who had two main jobs. One was to repair and maintain the equipment at the drilling site (the drilling rig, for example), a job coming close to the work in *Stansbury*, while the other was to weld the casings together before they were inserted into the ground (2a-3a). His previous experience in welding was limited to the maintenance of boat trailers and other repair work of a similar nature (3a).

The contrast between the work done by defendant's welder on the casings and the work to be done by Alaparet in repairing the fracture is striking. The defendant's welder's only contract with the casings was to weld them together while they were above ground by means of one continuous weld around the outside. Only then were the casings inserted into the ground (3a-5a). The welder stated that his experience in welding separated or broken materials was limited and that he had never welded separated materials which were like those in the present case (6a). Most important, he testified that he had never welded inside a pipe before nor had he welded inside similar structures such as large culverts (6a). In short, the defendant's one welder was used to doing only simple surface welding which did not call for any specialized techniques. As the defendant's supervisor clearly recognized, the repair work which led to Douglas Alaparet's death was of the nature that required a specialized welder (10a-11a, 12a, 16a).

The factual distinctions between the two Louisiana cases and the instant case emphasize the legal rules controlling all three cases. The legal principle which governs is quite simply this: unless the repair work is of the type that would normally be carried on by the contractee's

employees, there can be no employee-employer relationship between the contractee and the injured employee of a contractor doing the work, whether that contractor be considered an independent or a sub. Professor Larson amplifies this principle in § 49.12 of his treatise:

“Practically all of the cases of general interest interpreting this type of statute are addressed to one question: when is the subcontracted work part of the regular business of the statutory employer? The statutory language varies somewhat (citing language variants) . . . But, with a surprising degree of harmony, the cases applying these assorted phrases agree upon the general rule of thumb that the statute covers all situations in which work is accomplished which this employer, or employers in a similar business, would *ordinarily* do through employees.

“The activities which produce most of the close cases are the same activities which have caused difficulty in the employee-independent contractor distinction . . . peripheral and auxiliary operations such as maintenance, construction, and delivery. Here again the test must be relative, not absolute, since a job of construction or repair which would be a non-recurring and extraordinary undertaking for a small business might well for a large plant be routine activity which it normally expects to cope with through its own employed staff . . . Major repairs or *specialized* repairs, of the sort which the employer is not equipped to handle with his own force, are held to be outside his regular business (citing examples).

\* \* \*

“In some of the closer cases, which in the abstract look as though they might be decided either way, the courts rely heavily upon evidence of the past practice of this employer or employers in a similar business.”

Professor Larson cites the following examples for the latter proposition:

*Settle v. Baldwin*, 355 Mo. 336, 196 S.W.2d 299 (1946).

“Although one might think that icing refrigerator cars would be a part of the business of a railroad operating such cars, the contrary result was reached on a showing that no railway employees had been used for that purpose for twenty years.”

*Britton v. Ind. Comm.*, 248 Wis. 549, 22 N.W.2d 525 (1946).

“... the dusting of growing peas by aircraft was ruled an activity outside the business of a cannery, since the cannery had no equipment or employees adapted to this kind of work.”

*Cannon v. Crowley*, 318 Mass. 373, 61 N.E.2d 662 (1945).

“... a showing that it was the established practice not only of this particular steam-shovel owner, but of others in the same business, to get the shovels moved by independent contractors was held decisive in placing such transportation outside the business of the owner.”

The *Cannon* case is interesting as it was defendant's contention in the trial court that Nevada had adopted the broad type of compensation coverage applied in Massachusetts which, he argued, would encompass the plaintiff's decedent within and grant the defendant immunity from this “third party” action. *Cannon v. Crowley* shows that merely shouting “common employment” will not suffice to establish an employer-employee relationship where it does not, in fact, exist.

The defendant also seems to raise another point in the affidavit of Mr. Fowler which states that the repair was necessary for the completion of the contract between the defendant and the Water District and that, because the repair was not completed by Alaparet, the defendant had to commence an entirely new well (20a-22a). The same theme appears in the affidavit of Mr. Lemon (22a-24a). The fact that a new well had to be commenced points up the special nature of the repair and the inability of the



defendant's employees to do the same. However, even if this reasonable inference is disregarded, the mere fact that the repair may have been necessary to the completion of the overall well-drilling project or even that the defendant was obligated to repair his own mistakes does not put the repair work in the course of defendant's business. As Professor Larson concludes in the above quoted section,

“From these cases it will be readily seen that the test is not one of whether the subcontractor's activity is useful, necessary, *or even absolutely indispensable* to the statutory employer's business since, after all, this could be said of practically any repair, construction or transportation service.”

The repair work upon which Alaparet was engaged when he suffered his fatal injury was not the type of work the defendant's employees did do in the past or could have done at that time. The overwhelming weight of evidence places it in the class of employment *not* in the course of the alleged employer's business of well drilling.

Even though the defendant was clearly the principal contractor in relation to the overall project of drilling the well with Harlan McNair arguably being a subcontractor on that project, the conclusion, based on the undisputed evidence in the present case, that Douglas Alaparet's employment was both “casual” and not in the course of the defendant's business of well drilling excludes him from the category of being defendant's employee under N. R. S. 616.060.

### The Defendant Is On The Horns Of A Dilemma

The present case may be looked at from a slightly different perspective. In the above argument, the overall project of well drilling was given the central position. There is no question that the defendant was the Water District's principal contractor on that project and that the project of well drilling was the defendant's business. Plaintiffs do not as readily concede that Harlan McNair was a sub-

contractor on this project as they do not believe that the correct interpretation of N.R.S. 616.085 and 616.115 permits that result. However, even assuming the defendant to be correct, the "casual" and ancillary nature of Alaparet's employment would exclude him from the defendant's employ in regard to the well-drilling project.

Instead of looking at the overall project of well drilling, however, one could consider the repair job to be a project in itself. This follows from the above argument which certainly indicates that the repair of casing fractures is beyond and distinct from the business of well drilling. If this view of the present factual situation is taken, several Nevada cases support the proposition that it was Harlan McNair, not the defendant, who should be regarded as the principal contractor on the repair of the fracture. In both *Simon Service v. Mitchell*, 73 Nev. 9, 307 P.2d 110 (1957) and *Titanium Metals v. District Court*, 76 Nev. 72, 349 P.2d 444 (1960), an owner of the premises, not normally in the construction business, had undertaken to contract for the erection of a building. In effect, each owner acted as his own general contractor. In both cases, the owner employed men directly under him to work on the construction project (in *Titanium*, 54% of the work), as well as subcontractors for specific phases of the work. Both cases applied the principle that:

"If an owner chooses to retain in his own hands the business of erecting the building, and to parcel out fractions of the work of construction among separate contractors each responsible solely to the owner for a fraction only of the entire work, the owner must be held to be the principal employer . . . and also to be engaged in the business of constructing the building."

Extension of the above principle to the present case would mean that the defendant could be regarded as having been temporarily engaged in a business (specialized welding repair) different from his primary business of well drilling. If so, then Alaparet's employment was certainly in the course of that business, "casual" or not. But, if the defendant is to be looked at as engaging in a new business,

it is by no means certain that his status of a principal contractor would still be retained, as well as Harlan McNair's arguable status as a subcontractor.

*Titanium Metals* indicates that the test as to whether a person is a subcontractor, a principal contractor, or merely a person "having the work done" depends on the share of the project undertaken by that person. For example, in *Titanium*, Titanium Metals was engaged primarily in metal processing. The court found that Titanium Metals was the principal contractor on its secondary construction project because it provided 54% of the labor and materials on that project directly. Atkinson, the alleged principal contractor, contributed only 46% to the project. To arrive at these percentages, the court looked only to the share of the particular project in which Titanium Metals was temporarily engaged. Presumably, if Atkinson had contributed over 50% of the work on that project, he, not Titanium Metals, would have been held to be the principal contractor. Applying this analysis to the present case, the determination of the relationship between the parties on the project of repairing the fracture would depend on the shares of their participation on that project. To consider this case in light of *Simon* and *Titanium*, the activities of the parties in regard to the repair job, and that alone, must be looked to.

In the present case, the defendant contributed virtually nothing to the repair of the fracture. Harlan McNair was to supply all the labor and materials (19a). Defendant's employees' only contact with the work, save for the disputed factual issue of who was responsible for turning on the oxygen, was to lower Douglas Alaparet into the well on a sling which he had constructed himself (15a-17a). Nor were there any other subcontractors involved in the repair of the fracture. Under *Titanium*, a person becomes a principal contractor only when he does over 50% of the work himself through directly employed employees or, in combination with *Simon Service*, when he subcontracts out a majority of the work among several subcontractors, each of whom is responsible for a minority of the project. In the present case, Harlan McNair

was obviously responsible for the bulk of the repair project, and it is not too much to say that defendant's participation, alone or through other contractors than McNair, was totally insignificant in regard to that project.

In *Simon Service*, as in *Titanium Metals*, the businessman who was temporarily engaged in the construction project assumed the greater bulk of the work through directly hired employees:

"Appellant, although it employed no general contractor for the entire construction, did employ as a separate contractor, the plumbing contractor to install the sheet metal work, as well as employing separate contractors for other phases of the work. . . . In turn the fact that appellant itself undertook construction of the building (by directly employing two carpenters and a construction engineer) and entered into separate contracts for installation of the plumbing, sheet metal, electrical wiring, painting, etc. would seem to indicate that it could reasonably be designated the principal contractor."

The rationale behind the *Simon* decision that the owner was also the principal contractor is found in these words, which show the court's fear of the consequences if the decision had gone the other way,

". . . It would compel an owner, *who is himself an experienced construction man*, to employ a 'principal' contractor who would, perchance let out every phase of the work in subcontracts precisely as the owner would do without the intervention of a 'principal contractor'."

The thrust of this language seems to be that not only must there be substantial participation for one to be temporarily engaged in a business as a principal contractor, but also a modicum of experience in that business. If these criteria are lacking, as in the present case, a contractee temporarily engaged in a project cannot be the principal contractor for that project. In the words of *Simon*, he would be merely "a person having the work done" who is not



an employer of the employees working on the project. It is submitted that relative to the repair project, which is the only business under the present facts that Douglas Alaparet's employment could have been in the "course of", Harlan McNair would stand under the *Simon Service* and *Titanium Metals* decisions as the principal contractor and the defendant as "a person having the work done".

To recapitulate both arguments, the defendant is on the horns of a dilemma. If he argues that the repair project is to be looked at as part of his overall business of well drilling, where he is obviously a principal contractor and Harlan McNair is arguably a subcontractor by virtue of statutory "construction", the record shows that Douglas Alaparet's employment was both "casual" and not in the course of that business. If he argues that the repair project should be considered to be independent of the business of well drilling, which is quite reasonable in light of the record, he avoids the "not in the course of" road-block. However, adding the inconsequential participation of the defendant in the repair project to the holdings of *Simon* and *Titanium* leads to the conclusion that the defendant was not a principal contractor in relation to the repair project, but merely "a person having the work done". In neither case, can Douglas Alaparet be considered an employee of the defendant.

**"Only When Acting As A Subcontractor To  
A Principal Contractor Does N.R.S. 616.115  
Apply To Include Independent Contractors"**

The defendant's argument before the trial court emphasized his belief that N.R.S. 616.115 includes all independent contractors, working on a project, within the class of subcontractors to the principal contractor on that project, in which case N.R.S. 616.085 makes the independent contractor's employees also employees of the principal. While there is *dicta* in *Simon* which may be construed to support this argument,

“... it makes no difference whether we consider the plumbing company to have been a subcontractor or an independent contractor. It did in any event enter into a contract for installing the sheet metal work — and it entered into such contract with the defendant.” 73 Nev. at 12.

“... Whether these separate and individual contractors are denominated subcontractors or independent contractors would not affect their direct relationships with appellant.” *Id.* at 16.

there is clearer Nevada authority that the sweep of the Nevada “contractor-under” statute is not as broad as the defendant would have it. Two years *after* the court in *Simon* laid down the above language upon which the defendant so heavily relied below, the Attorney General of Nevada declared,

“The Act does not apply to ‘independent contractors’ *who are truly such in fact* (emphasis in original).

...

“The reference to the words, ‘contractor’, ‘contractors’, ‘subcontractor’; and ‘subcontractors’, as used in the Act, indicate that the Legislature contemplated application of the Act to relationships normally existing in the building industry. This industry, where the incidence of accident and injury is normally high because of the nature of the work involved, is a matter of serious concern, for which the Act would be expected to make adequate provision. In order to insure proper industrial insurance coverage in the building construction industry, the Act therefore, expressly provides that subcontractors and their employees shall be deemed to be employees of the principal contractor. (NRS 616.085). *Only when acting as such ‘subcontractor’ to a ‘principal contractor’* (emphasis in original), does NRS 616.115 apply to include ‘independent contractors’. It is possible for an ‘independent contractor’ to be such, in fact, for one

purpose, and a 'subcontractor' and 'employee' for another purpose, as in the building industry." 1959 O.A.G. 457 at 459, 460.

"Subcontractor" is nowhere defined in the Nevada Act. One may assume from the above quotation that the definition favored by Nevada would parallel the usual dictionary definition barring contrary expressions by the Nevada courts. The generally accepted definition of "subcontractor" is:

"One who takes a portion of a contract from a principal contractor or another subcontractor. . . . One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance. . . ." *Black's Law Dictionary* 1593 (4th ed. 1951).

The thrust of this definition certainly seems to predicate the existence of a subcontract upon a fractional taking over of an activity which was contemplated to be within the scope of the original contract or which is usually associated with completing that type of contract. Viewed in this light, the contractors in *Simon Service* and *Titanium Metals* were clearly subcontractors, even if an attempt was made to call them "independent contractors", since they undertook to complete a portion of the original contract. The activities that they engaged in were those normally associated with construction of a building. In the present case, it is inconceivable that the defendant and the Water District included the activity engaged in by Douglas Alaparet with the activities necessary to complete the well drilling contract. The record establishes that the fracture which raised the need for the repair was unprecedented and none of the defendant's employees had seen or heard of a similar incident (1a, 10a, 12a). It would seem to be clear from this fact that Harlan McNair did not take a portion of the contract between the defendant and the Water District. It also seems clear that Harlan McNair did not contract for performance of an act for which the



defendant had already contracted. The defendant admitted that his own employees were incapable of making the repair (16a), which is more than adequately borne out by the record (5a-6a, 10a-11a, 12a, 20a-21a). From these facts, it seems rather doubtful that Harlan McNair could be termed a "subcontractor" in the normal sense of the word. Since "independent contractors" are "subcontractors" only when acting as such to a principal contractor, these facts would exclude Harlan McNair from the category of a "subcontractor."

To bolster his argument, defendant argued that Nevada, through *Simon Service*, had adopted the "common employment" doctrine of Massachusetts. If so, it was adopted *sub silentio* and in disregard of the clear wording of the Nevada "same employ" statute, N.R.S. 616.560. However, even if Nevada did adopt the "common employment" approach, it would gain the defendant little because of the facts of this case. *Anderson v. N.Y., N.H. & H. R.R. Co.*, 159 F. Supp. 90 (D. Conn. 1958), considered a situation analogous to that at bar. The plaintiff was an employee of the Pullman Company which had entered into a contract with the defendant railroad to service its cars. In defense to plaintiff's "third party" action, the railroad raised the defense that the plaintiff was engaged in a "common employment" with the railroad. It would appear that the Massachusetts rule makes no express distinction between independent contractors and subcontractors. There are still limitations on this rule, however, as *Anderson* brought out,

"The Railroad to avail itself of section 18 as an effective defense, must show (in part):

1. That the Railroad entered into a contract with the Pullman Co. to do a part of the Railroad's work.
2. That the work done by the Pullman Co. for the Railroad was not 'merely ancillary and incidental' to the business of the Railroad."

The limitations placed on the "common employment" rule by *Anderson* are no different, at least not substantially different, than the limitations imposed by "not in the course of" statutes. Hence, whether one argues "common employment", "same employ", a peculiar brand of statutory construction or whatnot, the basic question in this case, which will be determinative of this present issue as to whom Douglas Alaparet was employed by, *is whether or not the specialized welding repair of the fracture was work which would be ordinarily done by a well-drilling contractor.*

If an ordinary well driller in Las Vegas County would not normally do this type of specialized repair, and plaintiffs take the position that the record bears out the fact that an ordinary well-driller would not, then there is no reason to apply the "contractor-under" or "statutory employer" statute to their decedent. As Professor Larson puts it, at § 49.11,

"The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers. The statute also aims to forestall evasion of the act by those who might be tempted to subdivide *their regular operations* among subcontractors, thus escaping direct employment relations with the workers and relegating them for compensation protection to small contractors who fail to carry . . . compensation insurance."

*Can it be said that the repair work carried on by Douglas Alaparet was part of the regular operations of the defendant?*

### Conclusion

The key facts which control the question of Douglas Alaparet's employment relationship with the defendant, or lack of it, are (1) that the fracture was unprecedented in the business of well-drilling in the area; (2) that the repair work was specialized and beyond the capability of the defendant's employees; (3) that the defendant did not have equipment on hand to fix the fracture; (4) that Harlan McNair took on the entire repair project with the defendant contributing little or nothing in the way of labor, materials or experience; and (5) that the contract price for the repair was \$20.00.

These facts are well established by the record. They arise from the defendant's own testimony and that of his employees. It is the plaintiffs' position that these facts show that Douglas Alaparet was not an employee of the defendant, statutory or otherwise.

A Court of Appeals may direct a district court to enter a summary judgment for an appellant even though the appellant did not make motion therefor. *First Nat. Bank v. Maryland Cas. Co.*, 290 F.2d 246 (2d Cir. 1961); *cf.*, *United States v. Great Northern Ry. Co.*, 337 F.2d 243 (8th Cir. 1964); see also *Make v. Celebrezze*, 236 F. Supp. 174 (N.D. Cal. 1964).

The issue as to Douglas Alaparet's employment status was clearly before the district court as were the undisputed facts outlined above. Plaintiffs suggest that the district court took a too limited view of the applicable law when it granted the defendant's second motion for summary judgment. They urge that an opposite result should have been reached on this issue.

### RELIEF

Plaintiffs respectfully request this court to reverse the summary judgment entered in the district court in favor of the defendant on the issue of their decedent's employ-

ment status and to direct that court to enter judgment for them on that issue, or in the alternative, to grant any such relief as this court feels is fair and just.

Respectfully submitted,

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### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

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22082

IN THE  
UNITED STATES COURT  
OF APPEALS

FOR THE NINTH CIRCUIT

BRYAN ALAPERET and LAURIE ALAPERET,  
by KAREN ALAPERET, as Guardian ad Litem,  
and KAREN ALAPERET,

*Plaintiffs-Appellants,*

vs.

~~Civil Action No. 785~~

W. D. PHELPS, d/b/a PHELPS PUMP  
AND EQUIPMENT COMPANY,  
*Defendant-Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF NEVADA

APPELLANTS' APPENDIX

FILED

NOV 13 1967

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1a  
*Deposition of Melvin Dale Briner*

DEPOSITION OF DEFENDANT'S WITNESS, MELVIN  
DALE BRINER, DATED JANUARY 18, 1966

QUESTIONS BY MR. SCHROCK:

\* \* \*

(43)

Q. Have you ever run into a problem such as you had here —

A. Never.

Q. — before? Had you ever run into a problem similar to that in some of the smaller sizes again where you weld the pipes?

A. No.

Q. This is the first time it has ever happened?

A. First time.

Q. Do you have any idea, does Phelps employ any other driller other than yourself?

A. I am the only one that has been there steady over this period of time, but he has employed other drillers.

Q. Have you ever had any discussions with these other drillers with respect to this type of thing happening where you have a fracture in the pipe?

A. I might have, might have.

Q. Had you ever heard of a situation like this occurring prior to the time that it did occur to you?

A. You will have to explain that a little.

Q. Well, did anyone ever — had you ever been in any discussion with any other drillers who had mentioned that they had had this sort of thing happen that there was a fracture in the pipe that had to be repaired?

(44)

A. No.

\* \* \*

*Deposition of Edward Lee Fowler***DEPOSITION OF DEFENDANT'S WITNESS, EDWARD  
LEE FOWLER, TAKEN JANUARY 18, 1966****QUESTIONS BY MR. SCHROCK:**

\* \* \*

(1)

Q. And what is your position with the Phelps Pump and Equipment Company?

A. I am the welder.

Q. And how long have you been employed by Phelps?

A. Three years now — about three years.

Q. As a welder for Phelps, are you attached to any particular crew, or just where they send you?

A. Just wherever they send me.

Q. What general type of work do you — welding work, do you do for Phelps?

(2)

A. Well, mostly maintenance on their equipment.

Q. Mostly maintenance?

A. Yes.

Q. This would be in the yard itself?

A. Well, at times, yes, and if something breaks on the rig at the sites, well, then I have to go to the sites, wherever the well sites are, or the pump equipment, wherever it is.

Q. Do you know how many welders Phelps employed?

A. Well, now, what do you mean — you mean employed as welders?

Q. Yes, as welders.

A. Well, I am the only one as a welder.

Q. Do you take care of all of the welding so far as the casings are concerned, too, when they are inserted in the wells?

A. Yes, I do.

Q. And the maintenance of the equipment?

A. Right.



*Deposition of Edward Lee Fowler*

Q. What did you — for whom did you work prior to the time that you came to work for Phelps?

A. Buck's Welding Shop here in Las Vegas.

Q. In Las Vegas — and how long did you work for them?

A. Oh, about a year, I would say.

Q. What type of welding work did you do there?

A. Well, that consisted of maintenance of boat trailers and (3) just about anything that would come in.

Q. Was this —

A. General welding.

Q. Was this a special type of welding shop?

A. No, I wouldn't say that it is. It is just arc and acetylene welding.

Q. Work was brought in there?

A. Right, it was brought to the shop.

Q. Did you ever have to go out on a job or anything?

A. I went out on two jobs, I think — it was mostly inside work there.

Q. Repair type work?

A. Yes.

Q. Are you acquainted with the General Machine Shop?

A. No, I am not — other than this situation here.

Q. Well, now, what I wondered, if this shop where you had worked was of a similar nature, whether or not you knew?

A. No, the shop that I worked was smaller than General Machine. Now, from what I see of General Machine, I think they are a bigger organization.

\* \* \*

(6)

Q. The welding that you have done at this well site consisted of what?

(7)

A. Of welding the conductor pipe, or this casing, as we refer to it — I weld the joints together, and then we would place that one in the ground, and then another

*Deposition of Edward Lee Fowler*

on top, and we would weld that around and place it into the ground.

\* \* \*

(8)

Q. Where are the sections located at the time that you weld them?

A. At the time that I weld them, well, there will be one or more in the ground protruding outside the ground, and then I place this from the second one onto whatever number that we use, and I will make a weld around it. Then that one is let into the hole and then stopped by clamps until we put the other section on top of that.

\* \* \*

(9)

Q. And then are the ends of those sections butted together?

A. Yes, they are.

Q. And then what do you do?

A. Then I weld them.

Q. You weld them around the outside?

A. Right.

Q. You run a continuous weld?

A. A continuous weld from the outside.

Q. What type of equipment do you use?

A. A portable welding machine.

Q. Is this a standard type of machine?

A. Yes, sir.

(10)

Q. What type of equipment did Mr. Alaperet use?

A. He had —

Q. So far as the welding is concerned.

A. The machinery was about the same as what I have — it is a portable welding machine on a truck.

Q. On a truck?

A. Yes.

Q. Now, how is this operated — is this by electricity?

A. How is what operated — the machinery?

*Deposition of Edward Lee Fowler*

Q. The welding machine, yes.

A. No, it is driven by a gasoline engine, and it is actually a generator which makes the electricity that you use to weld with.

Q. I see. And you run a continuous weld around the section of the pipe?

A. The outside, yes.

Q. Approximately how far above the ground is the one section protruding when you weld the second section on there?

A. Oh, it varies from two to four foot.

\* \* \*

(15)

Q. O.K. This fracture that you observed, was the welding (16) to repair the fracture any different than the welding you conduct in order to connect the casings together—the sections of the casing together?

A. Well, it would be, I believe, because, after all, it was my weld that broke, so evidently it didn't hold, so it would have to be better and in a different way to get that out of there, to get the pipe out.

Q. What do you mean by "better" — does this take a different technique in welding?

A. Well, I will put it this way: It would have had to have been a better weld than what I had on there.

Q. Well, is this the same type of weld that you put on other pipes?

A. Yes, it is.

Q. And it has held before?

A. Yes, it has held before.

Q. The fracture that you observed, what — how did it appear in the mirror, was it offset?

A. There was a separation of the pipe — you could see that the pipe had separated. Now, just how much I don't know, but you could see that there was a separation, and we could tell that it was a break there, but as far as the extent of it, well, we don't know, or I didn't know, or I couldn't see.

*Deposition of Edward Lee Fowler*

Q. Have you ever, in your — how many years' welding experience now actually do you have?

(17)

A. Oh, I guess about eight or nine years.

Q. Have you ever welded separated materials before?

A. Not anything like this, but I have — I have welded separated materials, yes, but different —

Q. In a different position?

A. Yes.

\* \* \*

MR. LEAVITT: Well, I would like to object to that as being speculative and conjectural. How does he know what he is going to, counsel? He has never been (18) confronted by such an experience.

If you want this witness to come up and just start doing a lot of guessing, why — I would like to object to the question.

MR. SCHROCK: He can still go ahead and answer.

MR. LEAVITT: I want him only to answer if he knows what he would do. I don't know how he would. How could he answer, counsel?

MR. SCHROCK: He has welded separated materials before.

MR. LEAVITT: That is what he testified, but he said — already asked and answered, too. He has not welded inside a pipe before, I think was his answer, too.

Q. (By Mr. Schrock): Have you ever worked on large-size culverts which you could walk into?

A. No, I haven't.

Q. When did you observe that this fracture had occurred — was it on November the 30th, or was it prior to that time?

A. The day before.

Q. The day before. Would that have been late in the afternoon, or early in the afternoon, or when, do you recall?

*Deposition of Edward Lee Fowler*

A. No, I don't recall what time of day it was. It was in the daylight hours because we used the mirror in order to see that.

Q. After you observed the fracture, then what did you do?

A. Well, the driller and I discussed what was the method (19) we thought we could fix it, or something, or if we knew someone that could do it. We could do it.

\* \* \*

(21)

Q. You were with Mr. Briner at the time that the General Machine Shop was contacted?

A. Yes.

Q. Now, with whom did you speak at the General Machine Shop?

A. The owner, Mr. —

Q. Would that be Mr. McNair?

A. McNair, yes.

Q. What was the substance of that conversation, if you don't remember it verbatim?

A. Well, on a piece of paper we drew him a sketch of our problem as we saw it, and discussed it with him, and he said that he had worked on similar cases at the Test Site, and said that he had a welder that was small enough to go in the pipe, but he hadn't arrived yet, and that it would be solely left up to him as to whether he wanted to accept the job or not.

Q. At what time was this you talked to Mr. McNair, do you know?

A. This was in the morning of —

Q. Of the date this accident happened?

A. Yes.

Q. Do you remember what time?

A. No, I don't remember exactly what time, but it was, I'd say, about 8:00 o'clock — possibly a little later.

Q. So then did you wait at the General Machine Shop until Mr. Alaperet arrived?



(22)

A. Yes, we did, we waited.

Q. Did you discuss this matter with him?

A. Yes, we did, we discussed it with him and showed him the diagram, also, and we made it clear that this is solely — if he didn't want to accept the job, well, then he didn't have to, but we wanted him to see it first before he made up his mind as to whether or not he wanted to do the job or not.

Q. Was there any discussion held at that time — at the time that you talked to Mr. Alaperet at the General Machine Shop, who was present?

A. Myself, Mr. Briner and Mr. Alaperet and the owner, and there was another person there, but I don't know who he was.

Q. The owner you speak of, you mean the owner of General Machine — Mr. McNair?

A. Mr. McNair.

Q. Was there any discussion with respect as to how the job was to be done?

A. Not that I remember, no. He — Mr. Alaperet said he would bring his own stand or sling or whatever he was going to use to go down into the pipe, and so we left from there and we went back to our shop and discussed it with Mr. Lemon, and then we were to call — call him and tell him when we were back out to the job site, I believe.

Q. While you were in the General Machine Shop, was there (23) any discussion with respect to ventilation of the pipe?

A. No.

Q. None at all?

A. None at all.

Q. Nothing said by anyone?

A. Not that I remember.

Q. Did Mr. Alaperet accept the job, or did Mr. McNair?

MR. LEAVITT: Which I object to as calling for a conclusion. I think he can state what was said. I would like to object to that.



*Deposition of Lloyd Ralph Lemon*

MR. SCHROCK: He mentioned there had been a discussion, and it was up to — they were to discuss this with Mr. Alaperet.

MR. LEAVITT: If you want to ask specific questions, all right, but not conclusions, as to who accepted it.

THE WITNESS: As far as I remember, both accepted.

\* \* \*

DEPOSITION OF DEFENDANT'S WITNESS, LLOYD  
RALPH LEMON, TAKEN JANUARY 18, 1966

QUESTIONS BY MR. SCHROCK:

\* \* \*

(8)

Q. Now, when this casing is installed, is it installed in pieces?

A. In sections.

Q. In sections?

A. Yes.

Q. Then how was this done?

A. It is welded.

Q. Do they what — place one section in at a time?

A. Yes.

Q. And then another section is connected to this?

A. It is welded directly to it to make a continuous length of pipe when installed.

Q. And then how was that inserted into the hole?

A. It is lowered in with the well rig.

\* \* \*

(11)

Q. Now, do you — have you done business before with the General Machine Shop?

A. Not that I recall.

*Deposition of Lloyd Ralph Lemon*

Q. Do you know who contacted the General Machine Shop with respect to having Douglas Alaperet come out there?

A. Our driller — Mr. Briner.

(12)

Q. Why was the General Machine Shop contacted to come out there?

A. Well, I was informed that there was a fracture in the casing, one of the welds had separated. The pipe had become stuck in the hole, couldn't be lowered, so in order to free the pipe, why, was using percussion method of jarring the pipe to get it free from the fill and to extract the pipe from the well, and during this time a fracture occurred. So I was notified that this had happened and at my suggestion, why, we contacted a specialist who would be able to repair this fracture because we couldn't do it from the surface.

Q. Why couldn't you do it from the surface?

A. The fracture itself was 24 foot below the ground level.

Q. Did this take a different type of welding than your welder did?

A. Our welder hadn't performed any of this type of work, and we felt like it was necessary to have a specialist do this type of work.

\* \* \*

(15)

Q. Now, have you ever had an incident such as this occur (16) before in your weld so far as a fracture —

A. No.

Q. — being involved in the casings?

A. No.

Q. Never had it before?

A. Not this nature.

Q. Have you ever had an instance occur wherein it was necessary to do this particular type of work before?

A. No.

11a  
*Deposition of Lloyd Ralph Lemon*

Q. This was the first experience that you had had?

A. Yes.

\* \* \*

(28)

Q. Who requested the General Machine Shop to come to the site to reweld this fracture?

A. Well, Mr. Briner went to locate a welding firm that could do this job for us, and he contacted the General Machine Shop and came to me and told me that he had made arrangements with him to perform the work.

Q. Is this type of welding that had to be done any different than the welding of the sections together?

A. Well, we felt like it was.

Q. In what respect?

A. Well, this had to be done on the inside of the casing and had to be a very, very good weld.

\* \* \*

(30)

Q. Did Mr. Briner discuss this fracture in the casing with you —

A. Yes.

Q. — before contacting the General Machine Shop?

A. Yes, he did.

Q. Was this the same day, or a previous day, or what?

A. That morning.

Q. That morning?

A. Yes.

Q. And what directions did you give him?

A. To locate a specialist, someone who could weld this.

\* \* \*

**DEPOSITION OF DEFENDANT'S WITNESS, EDWARD ANTHONY MLYNARCZYK, TAKEN JANUARY 18, 1966****QUESTIONS BY MR. SCHROCK:**

\* \* \*

(6)

Q. Do you have any idea about the reason why Mr. Alaperet was at the scene this day?

A. Yes.

Q. Do you know from your own personal knowledge?

A. Yes, I remember Mr. Lemon and Mr. Briner discussing the situation in the morning.

Q. Where did this take place?

A. This would be at the plant, W. D. Phelps pump yard and, it seemed like it was going to require a specialist to do the job due to the fact that the fracture was approximately 20 feet, or or 24 feet below, and that is about all I remember from the conversation. I remember that (7) they were discussing contacting General Machine — Mr. McNair — to see if he had a specialist that could handle the situation.

Q. What did you observe with respect to the equipment and the — well, with respect to the equipment at the scene when you arrived there on this particular day, November the 30th, 1964?

A. I didn't observe anything unusual. I sort of thought the specialist had everything in hand.

\* \* \*

(16)

Q. Have you, in your knowledge, known of any other circumstances such as this so far as the drilling of wells are concerned, where a fracture has occurred?

A. No, sir.

Q. In this particular field, so far as wells and pumps are concerned, all of your experience has been with Phelps?

A. Yes.

\* \* \*

*Transcript on Hearing for Summary Judgment***TRANSCRIPT ON HEARING FOR SUMMARY JUDGMENT, MAY 12, 1967. HON. ROGER D. FOLEY, JR. PRESIDING**

\* \* \*

(24)

**THE COURT:** This Court is going to grant the motion for summary judgment on the basis of the Court's views stated in the discussion and colloquy here with counsel

The Court takes the position so that in the event of an appeal that it is clear under the very language of the Nevada Industrial Insurance Act itself, whether or not McNair who did business as General Machine Shop and was the employer of the decedent Alaperet, whether or not McNair was the subcontractor or an independent contractor, the action is barred by the Nevada Industrial Insurance Act.

The Court does not decide at this time whether McNair was an independent contractor or a subcontractor. I don't think it's necessary because I think in either event the action is barred by the Industrial Insurance Act on the theory that by virtue of Section 616.085 subcontractors' employees are barred and a subcontractor includes an independent contractor and therefore employees of an independent contractor such as McNair in this situation.

Now, I'm not going to expand it further. It's unnecessary for this Court to decide any more. So your motion for summary judgment is granted, Mr. Leavitt. And the trial for next Tuesday is vacated, Miss Clerk. You will notify the jurors not to appear.

**MR. WISTI:** Your Honor, may I, not for the purposes of arguing with the Court on its decision, for a clarification (25) if I may, Your Honor?

**THE COURT:** I'll hear what you have to say.

**MR. WISTI:** Do I understand the import of the Court's interpretation of the statute to be that as long as there is any independent contractor or employee of an independent contractor or a subcontractor —

**THE COURT:** No, no, you do not so understand. I'm confining it to the facts of this case, that whether or not



*Transcript on Hearing for Summary Judgment*

Harlan McNair, the employer of the decedent, set the decedent to work on this pipe as a result of which he was seriously injured and died, whether or not the relationship between McNair and Phelps, the defendant in this action, was that of subcontractor or independent contractor, that by virtue of the Simon case and the specific language of the Nevada Industrial Insurance Act, the two sections I referred to, this action is barred: I'm not expanding it beyond that.

MR. LEAVITT: We have lodged the proposed order with the Court, Your Honor.

THE COURT: You have the proposed order?

MR. LEAVITT: It's been lodged with the Court.

THE COURT: May I see it?

MR. LEAVITT: We've placed it in the file.

THE COURT: Now, I'm not going to sign the finding you've presented because there's a finding that McNair was a subcontractor. I don't think it's necessary in this Court's decision, and the reason I denied the motion originally, and I (26) think now erroneously, was that I couldn't decide at that time whether or not it was a subcontract or an independent contract, and I thought that in any event that was a question of fact for the jury to decide. But the position the Court takes now is that regardless of whether in this situation there's an independent contractor or subcontractor, independent contract or subcontract, the action is barred.

MR. LEAVITT: There's also a second proposal, Your Honor.

THE COURT: May I see the summary judgment. I'm not going to sign your finding but I will sign your summary judgment.

MR. LEAVITT: Your Honor may want to cross out one line or two.

THE COURT: There are you, Miss Clerk.

MR. WISTI: Will the judgment be entered as of this date, Your Honor?

THE COURT: Pardon me?

MR. WISTI: Will the judgment be entered as of today?

THE COURT: I've just signed the summary judgment.



**WRITTEN INTERROGATORIES TO THE DEFENDANT,  
W. D. PHELPS, DATED JUNE 21, 1965, AND ANSWERS  
THERETO**

Q1. State the name, address, and capacity with the company of all the employees of PHELPS PUMP COMPANY present at the time of the accident on November 30, 1964.

A. Bill Matlock, address unknown; Ed Fowler, 3212 Osage Ave., Las Vegas, Nevada; Ed Mlynarczyk, 748 Rancho Circle, Las Vegas, Nevada; Lloyd Lemon, 3313 Westleigh, Las Vegas, Nevada; Melvin Dale Briner, 29 Hansen St., Henderson, Nevada.

Q2. State the nature of your contract to repair the fracture and the person, firm, or corporation with whom your company contracted.

A. A contract was made with Harlan McNair, reputed owner of General Machine Shop, to repair a fracture where-by he was to make the repair.

\* \* \*

Q5. Who held title to the real property upon which the accident of November 30, 1964, occurred?

A. It is not known who holds the title to the real property, but it is believed that Las Vegas Valley Water District had an easement on the property.

Q6. State the technical education of all of your employees at the job site.

A. None.

Q7. State the number of years of experience all of the employees at the job site had in their respective jobs.

A. Bill Matlock, unknown; Ed Fowler, approximately 15 years; Ed Mlynarczyk, approximately 15 years; Lloyd Lemon, approximately 15 years, of which 12 years were spent as General Manager; Melvin Dale Briner, approximately 15 years.

\* \* \*

Q9. What employee was in charge of the actual work at the site or scene of the accident?

*Written Interrogatories and Answers of W. D. Phelps*

A. None. Harlan McNair and Douglas Alaperet were in charge of the site at the time of the accident.

Q10. State the names of the employees who contracted General Machine Company to perform the work.

A. Mr. Melvin Dale Briner.

\* \* \*

Q12. Was any special equipment needed to perform this job and if so, describe such equipment?

A. Yes. Special welding equipment.

\* \* \*

Q16. What equipment did your company have at the job site where this accident occurred?

A. A drilling rig.

\* \* \*

Q21. How many welders are in the employ of your company and why did you contract with General Machine Company rather than having one of your own welders perform the work?

A. One welder. The work to be performed was out of his line of work.

\* \* \*

Q26. State whether or not there were any written specifications or plans for this welding job and if so, attach a copy and advise as to the name and address of the person who prepared such plans or specifications.

A. There were none.

\* \* \*

Q29. Describe the area into which the deceased DOUGLAS ALAPERET was lowered to perform the welding job, i.e., depth, width or diameter or circumference and the type of material out of which the area was constructed.

A. The hole had a 20' diameter casing. I am informed that Douglas Alaperet was lowered to a depth of approximately 24'. The material used in the construction was steel.

\* \* \*

*Written Interrogatories and Answers of W. D. Phelps*

Q31. How was DOUGLAS ALAPERET'S welding equipment lowered to him in the area where he was working?

A. I do not know because I was not present, but I am informed that it was lowered by Douglas Alaperet who had the equipment on his person.

\* \* \*

Q37. Did your company bring the oxygen to the job site and if so, how much oxygen was brought to the job site?

A. I do not know because I was not there, but I am informed that none of my employees did.

\* \* \*

Q41. Did you have any correspondence with anyone concerning this job and if so, attach copies of such correspondence?

A. General Machine Shop sent us a bill for \$20.00 and we paid this bill: a copy of the bill, marked PAID, and a copy of the check are attached hereto.

\* \* \*

Q45. Does your company employ any college graduated engineers and if so, state names and addresses of such engineers and the colleges and years graduated with type of degree granted?

A. No.

Q46. What was the job classification of each employee at the job site on the morning of November 30, 1964?

A. Bill Matlock, driller helper; Ed Fowler, welder; Ed Mlynarczyk, field superintendent; Lloyd Lemon, Manager; and Melvin Dale Briner, driller.

\* \* \*

Q50. State the name and address of the person, and his employer, who completed the welding job.

A. The job was not completed.

\* \* \*

*Written Interrogatories and Answers of W. D. Phelps*

Q52. Was an air circulation device of some kind used when the job was completed by another welder and if so, state the manner in which it was provided.

A. The job was never completed.

\* \* \*

(s) Elwin C. Leavitt  
Attorney for Defendant  
229 Las Vegas Boulevard South  
Las Vegas, Nevada

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STATE OF NEVADA

ss.

COUNTY OF CLARK

W.D. PHELPS, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled action and that he is the owner of PHELPS PUMP AND EQUIPMENT COMPANY; that he has read the foregoing Answers to Interrogatories and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

(s) W. D. Phelps

Subscribed and Sworn to before  
me this 21 day of June, 1965.

Rowena Mitchell  
My commission expires: .....  
Notary Public in and for said County and State.

*Affidavit of Edward Lee Fowler***AFFIDAVIT OF DEFENDANT'S WITNESS, EDWARD LEE FOWLER, DATED DECEMBER 10, 1965**

EDWARD LEE FOWLER, being first duly sworn according to law, deposes and says:

1. That he is of the age of majority, competent to testify as to facts stated herein and that he has personal knowledge of all facts stated in this Affidavit and that they are true to his own knowledge.

2. That on the 30th day of November, 1964, he was an employee of the defendant W. D. PHELPS and was on the job site near Gowan and Torrey Pines Rd., in the County of Clark, State of Nevada, at the time of the accident referred to in the Complaint and that your affiant saw DOUGLAS ALAPERET and saw him working there.

3. That at said time and place a well was being drilled and constructed for LAS VEGAS VALLEY WATER DISTRICT by defendant W. D. PHELPS, pursuant to a contract between the said District and defendant W. D. PHELPS.

4. That said work site is the same site at which DOUGLAS ALAPERET was injured and that your affiant observed him at the site.

5. That the work being performed by DOUGLAS ALAPERET when he was injured was being done pursuant to an agreement and contract with HARLAN McNAIR.

6. That HARLAN McNAIR told MELVIN DALE BRINER he would furnish certain equipment, furnish one of his employees, DOUGLAS ALAPERET, and complete the repair of a fracture inside the casing of the well at the said site.

7. That MELVIN DALE BRINER and your affiant were employees of the defendant W. D. PHELPS at the time and MELVIN DALE BRINER was actually working for defendant W. D. PHELPS.

8. That MELVIN DALE BRINER told HARLAN McNAIR that W. D. PHELPS would pay for the job when



*Affidavit of Edward Lee Fowler*

the job was completed, and this was said before DOUGLAS ALAPERET was injured.

(s) Edward Lee Fowler

Subscribed and sworn to before me this 10th day of December, 1965.

Mildred H. Leavitt  
Notary Public in and for said  
County and State.

**AFFIDAVIT OF DEFENDANT'S WITNESS, EDWARD LEE  
FOWLER, DATED JANUARY 14, 1966**

EDWARD LEE FOWLER, being first duly sworn according to law, deposes and says:

1. That he is of the age of majority and competent to testify as to the facts stated herein, that he has personal knowledge of all the facts contained herein, and that they are true of his own knowledge.

2. That the work being performed by DOUGLAS ALAPERET at the time he was injured on the 30th day of November, 1964, for and on behalf of his employer, was work in fulfillment of the same contract of defendant W. D. PHELPS with LAS VEGAS VALLEY WATER DISTRICT, as referred to in the other affidavits herein.

3. That on the 29th day of November, 1964, your affiant noticed an improper movement in the pipe at the well site being completed pursuant to said contract. By the use of a mirror reflecting the sunlight, affiant was able to see there was a break and fracture in the pipe.

4. That your affiant then knew the well could not be completed by the completion of the well in fulfillment of the contract of Defendant W. D. PHELPS with LAS VEGAS VALLEY WATER DISTRICT unless the fracture could be properly fused. That in order to properly fuse said pipe, it would be necessary to go inside the



*Affidavit of Edward Lee Fowler*

pipe because the pipe could not be raised from the hole, and the pipe would have to be fused on the inside by welding.

5. That in order to properly fuse said fracture in the pipe, it was necessary to contract for a welding firm to perform this work in order to complete the said contract as said well site.

6. That pursuant to the sub-contract and agreement entered into between the defendant, acting by and through MELVIN D. BRINER and HARLAN McNAIR, as set forth in the previous affidavit of your affiant, your affiant saw the said DOUGLAS ALAPARET while he was actually in the performance of said work in fulfillment of the contract with defendant W. D. PHELPS and LAS VEGAS VALLEY WATER DISTRICT at the job site on the 30th day of November, 1964, at the time the said DOUGLAS ALAPARET was injured.

7. That your affiant previously stated in his affidavit that the said DOUGLAS ALAPARET was to complete the repair of a fracture, and said work was referred to as repair work and consisted of the fusion of a conductor pipe, which is also known as casing (although not referred to as casing by the terms of said contract), and is also referred to as pipe herein. That said work attempted to be performed by the said DOUGLAS ALAPARET was necessary to complete said well to fulfill the contract of defendant W. D. PHELPS with LAS VEGAS VALLEY WATER DISTRICT, and it was not intended by your affiant to refer to the repair in a limited sense. It was repair work because the previous weld had broken.

8. That said work being performed by defendant DOUGLAS ALAPARET was work necessary to fulfill a part of said contract entered into between said defendant W. D. PHELPS and LAS VEGAS VALLEY WATER DISTRICT by reason of the fact that said work had to be performed before said well could be completed pursuant to said contract.

9. That by reason of the fact that the said DOUGLAS ALAPARET did not complete the work for and on behalf of his employer, the well could not be completed in fulfillment of the said contract between defendant W. D.

*Affidavit of Lloyd Ralph Lemon*

PHELPS and LAS VEGAS VALLEY WATER DISTRICT, and defendant W. D. PHELPS was forced to and did commence the drilling of an entirely different well near the same site so as to fulfill said contract.

(s) Edward Lee Fowler

Subscribed and sworn to before me this 14th day of January, 1966.

Mildred H. Leavitt  
Notary Public in and for said  
County and State.

(SEAL)

**AFFIDAVIT OF DEFENDANT'S WITNESS, LLOYD  
RALPH LEMON, DATED JANUARY 14, 1966**

LLOYD RALPH LEMON, being first duly sworn according to law, deposes and says:

1. That he is of the age of majority and competent to testify to matters herein, and that he has personal knowledge of all the matters stated herein.

2. That on the 4th day of November, 1964, your affiant was an employee of W. D. PHELPS, the defendant herein, and that he has been ever since said date, and is now, an employee of said defendant.

3. That the portions of the agreement referred to in Article 4 of the agreement which is attached to the affidavit of W. D. PHELPS, save and except for the instructions to bid and the specifications and drawings and some other addenda, are attached to this Affidavit and are a part of the agreement attached to the Affidavit of W. D. PHELPS and are designated as follows:

(a) LAS VEGAS VALLEY WATER DISTRICT  
NOTICE INVITING BIDS FOR DRILLING  
WELL NO. 29.

(b) WELLS — SPECIAL CONDITIONS.

*Affidavit of Lloyd Ralph Lemon*

- (c) PROPOSAL.
- (d) PROPOSAL BIDDING SHEET.
- (e) LAS VEGAS VALLEY WATER DISTRICT STANDARD SPECIFICATIONS S-11 FOR DRILLING WATER WELLS BY CABLE TOOL METHOD.
- (f) LAS VEGAS VALLEY WATER DISTRICT SPECIFICATION NO. G-2.

4. That each and every item attached hereto is a part of the contract entered into by the defendant to drill a well at the place described in the Affidavit of W. D. PHELPS.

5. That pursuant to said documents, the defendant was required to furnish conductor pipe 20" inside diameter by 5/16" to a depth of 100 feet pursuant to the fourth item of requirements set forth in "WELLS — SPECIAL CONDITIONS."

6. That pursuant to paragraph 3 of LAS VEGAS VALLEY WATER DISTRICT STANDARD SPECIFICATION S-11 FOR DRILLING WATER WELLS BY CABLE TOOL METHOD, it was necessary for defendant W. D. PHELPS to install the conductor pipe of steel so that it would be "joined with continuous welds so made as to avoid angular distortion."

7. That pursuant to paragraph 40(a) of LAS VEGAS VALLEY WATER DISTRICT SPECIFICATION NO. G-2, the said defendant was also required, pursuant to the terms of said contract, to make good all defective work.

8. That the said defendant, in order to fulfill said contract, was required to comply with all of said terms and conditions set forth herein.

9. That by reason of the fact that said defendant was informed that the component parts of the conductor pipe had not been completely fused by welding, the defendant was unable to complete the drilling of said well and had to abandon the same and had to commence drilling another well near the same site in order to fulfill said contract.

*Affidavit of Lloyd Ralph Lemon*

10. That the work of fusing any and all fractures in the conductor pipe used in the well was necessary in order for said defendant to fulfill said contract with the LAS VEGAS VALLEY WATER DISTRICT.

11. That the defendant W. D. PHELPS, when he learned that the decedent had not completed the fusion of the conductor pipe, was compelled to and did abandon the entire drilling operation and construction at said site and re-commenced the drilling and construction of an entirely different well so that he could fulfill the contract with the LAS VEGAS VALLEY WATER DISTRICT, by furnishing 100 feet of conductor pipe "joined with continuous welds," as provided for in said contract and specifications so as to avoid angular distortion.

12. That the contracting for the welding of the fracture in the conductor pipe of said well was ordered and authorized by me for the purpose of fulfilling the contract between the defendant W. D. PHELPS and the LAS VEGAS VALLEY WATER DISTRICT.

13. That at all times mentioned in plaintiffs' Complaint, the defendant W. D. PHELPS maintained, and still maintains, industrial insurance with the Nevada Industrial Insurance Commission on all employees for all persons directly employed by him and paid, and still pays, the premiums for said insurance.

(s) Lloyd Ralph Lemon

Subscribed and sworn to before me  
this 14th day of January, 1966.

MILDRED H. LEAVITT

Notary Public in and for said County  
and State.

(Notary Stamp)

DEC 7 1967

**In The  
UNITED STATES COURT  
OF APPEALS  
FOR THE NINTH CIRCUIT**

RYAN ALAPARET and LAURIE  
ALAPARET by KAREN ALAPARET, as  
Guardian ad Litem, and KAREN ALAPARET,

*Plaintiffs-Appellants,*

vs.

W. D. PHELPS, d/b/a PHELPS PUMP AND  
EQUIPMENT COMPANY,

*Defendant-Appellee.*

NO. 22082

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF NEVADA

**BRIEF FOR DEFENDANT-APPELLEE**

**FILED**

ELWIN C. LEAVITT

*Attorney for Defendant-Appellee*

DEC 4 1967

Business Address:

229 Las Vegas Boulevard South  
Las Vegas, Nevada 89101

WM. B. LUCK, CLERK





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# I

## JURISDICTIONAL STATEMENT

The court is without jurisdiction in this case in that the Nevada Industrial Commission is the sole tribunal to grant relief to plaintiffs. The award made by the Nevada Industrial Commission to the plaintiffs, pursuant to its sole and exclusive jurisdiction under Chapter 616 of Nevada Revised Statutes, is the sole remedy of the plaintiffs. There is no "statement of any pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction to review the judgment" appearing in the appellant's brief. (Rule 18b)

There is no reference to "the pleadings necessary to show the existence of jurisdictions, referring to the pages of the record in which they appear" appearing in the appellant's brief. (Rule 18b(3) )

# II

## STATEMENT OF THE CASE

Although there may be an allegation in the complaint that the defendant introduced oxygen, it is not an issue in this case. This position was abandoned by the plaintiffs pursuant to stipulation in the pre-trial order filed in the District Court on May 3, 1967 pursuant to Paragraph III and Paragraph VIII of said pre-trial order which omitted any reference to the admission of oxygen as an issue of fact or law in the case. (Record 256-261) There is no liability as a matter of law. There is no evidence to show that any oxygen was introduced by any employee of the defendant. All of the available witnesses so testified at the depositions. The oxygen line was taken into the shaft by the decedent. The question of liability was before the District Court and was argued. It was stipulated that the pre-trial order would supercede the pleadings. (Record, paragraph VIII, Page 261) There is no disputed facts in this regard.

The plaintiffs admitted and acknowledged that Mr. McNair was a subcontractor. (Paragraphs 4 and 7, Record 86 and 87)

To say that the decedent was a "statutory employee" of the defendant is over-simplification. The statute provides the decedent is *deemed* to be an employee of the defendant. (Emphasis supplied) (N.R.S. 616.115)

The appellants have received and are receiving monthly benefits from the Nevada Industrial Commission, pursuant to the claim they made which the plaintiffs acknowledge and are using as a basis for this lawsuit by relying on N.R.S. 616.560. (8, 9 and 10, Record 63-64 and paragraphs 8, 9 and 10, Record 87) (First sentence of the appellants' statement of the case) The claim was based on the fact that the decedent was an employee of Mr. McNair.

The billing by Mr. McNair was for an uncompleted job and was not a billing for the full amount intended by the contracting parties.

The decedent stated "I know better than that" after he reached the surface.

The well was being drilled in Nevada and the alleged injury occurred in Nevada. (Paragraph 3, Complaint) (Affidavit of Phelps, paragraph 5, 92) (Paragraph 2, Affidavit of Edward Lee Fowler, appellants' appendix 19a)

The decedent was an employee in the course of his employment with Mr. McNair on the day of the accident. (Paragraph 2, 86)

### III

## SUMMARY OF ARGUMENT

### A. FACTS

The defendant was a principal contractor. Mr. McNair, the decedent's employer, was either a subcontractor or an independent contractor of the principal contractor.



## **B. STATUTES**

Compensation for injuries or death is conclusive, compulsory and obligatory. (N.R.S. 616.370)

Civil actions may only be maintained against any person "other than the employer or a person in the same employee." (N.R.S. 616.560)

"Subcontractors and their employees shall be deemed to be employees of the principal contractor." (N.R.S. 616.085)

"Subcontractors shall include independent contractors." (N.R.S. 616.115)

The action is barred. (N.R.S. 616.270)

## **C. CONCLUSION**

The decedent is deemed to be an employee of the principal contractor and the plaintiffs are barred from maintaining a suit against the defendant.

## **IV**

### **APPELLANTS' ARGUMENT DISTINGUISHED**

#### **A. Appellants' "Same Employ" and "Contractor-Under" Statute Theory**

The controlling provisions of the Nevada Industrial Insurance Act were amendments to the act which makes Nevada law unique. The common law assertions of the right to a "third party" action are of historical interest only when the applicable Nevada statutes are considered.

Section 71 of Larson, Workman's Compensation, cited by the appellants, refers to rights against strangers, as such, not to contractors on the same job. Section 72, quoted by the appellants, is referred to as four variants by Professor Larson. (Vol. 2, pages 170 and 171) The appellants have selected the second variant but the Nevada courts have already selected the third variant for construction projects which bars recovery for suits against

“(3) the employer, persons in the same employ and all contractors and their employees engaged upon a ‘common employment’ or upon a ‘related purpose’.”

The case of *Nevada Industrial Commission v. Bibb*, 78 Nev. 377, 374, P.2d 531 (1962), cited by the appellants, is not a case of “common employment” but only one involving the question of whether the claimant was an employee. There is no issue as to whether the decedent was an employee of Mr. McNair, the subcontractor. (Admitted Par. 3, 86 in response to Par. 2, 62) To apply a test of control to determine whether he is also an employee of the principal contractor, as a matter of fact, serves no purpose because the Nevada statute expressly states he is deemed to be an employee of the principal contractor.

The fact that Nevada also has a “contractor-under” statute is a factor which should add to the immunity of the principal contractor. Professor Larson states in this respect as follows:

“Since the general contractor is thereby, in effect, made the employer for the purpose of the compensation statute, it is obvious that he should enjoy the regular immunity of an employer from third-party suit when the facts are such that he could be made liable for compensation; and a great majority of cases have so held.” (2 Larson’s Workman’s Compensation Law, 175 Sec. 72.31)

Some of the cases on pages 204-207 of the supplement to Volume 2 of Larson’s Workman’s Compensation which tends to support his quoted statement are as follows:

*Accord, Girardi v. Lipset, Inc.*, 275 F.2d 492 (3d Cir. 1960) Contractor a statutory employer; plaintiff’s sole remedy workmen’s compensation.  
*Anderson v. Benson Mfg. Co.*, 338 S.W. 812 (Mo. 1960). A private employer hired the claimant

through a protective agency to guard his plant. The guard was a statutory employee.

*Thompson v. Kroeger*, —Mo. —, 380 S.W. 2d 339 (1964). Plaintiff's employer was a sub-contractor of one of the defendants, who was in turn the sub-contractor of the other defendant, the general contractor. Held: Plaintiff was statutory employee of the general contractor and was barred from bringing an action in tort.

*Anderson v. Steurer*, —Mo. —, 391 S.W. 2d 839 (1965). Noeller, general contractor on the job in question, hired Steurer to do the lathing and plastering. In turn, Steurer hired Stroup, claimant's immediate employer, to do the lathing work. There was a question whether Stroup was a subcontractor of Steurer or a joint venturere with him. The court held that a tort action against Steurer was barred under either theory by the Workman's Compensation Act.

*Thibodaux v. Sun Oil Co.*, 40 So. 2d 761 (La. App. 1949), aff'd, 218 La. 453, 49 So.2d 852. Statutory Employer Immune.

*Maryland Cas. Co. v. Gulf Refining Co.*, 110 So. 2d 784 (La. App. 1959). The refining company held immune from suit as the statutory employer of the employee of a bulk distributor. The existence of insurance on the contractor is not material in Louisiana. (See Sec. 49.12, n.42 Larson's Workman's Compensation Law)

*Best v. J & B Drilling Co.*, 152 So. 2d 119 (La. Ap. 1963). Repair of drilling-rig compressors held to be part of the "Trade, business or occupation" of the drilling company. Tort action by an employee of the repair company against the drilling company dismissed. (Also cited on page 17 of appellants' opening brief)

*Mosely v. Jones*, 224 Miss. 725, 80 So.2d 819 (1955) Text quoted in holding that general contractor is immune from suit.

*Whittaker v. Douglas*, 179 Kan. 64, 292 P2d 688 (1956)

*Moore v. Philadelphia Elec. Co.*, 189 F. Supp. 808 (E. D. Pa. 1960) General Contractor, as statutory employer, immune.

*Kelpfer v. Joyce*, 197 F. Supp. 676 (D. Pa. 1961) The general contractor was immune from a third-party suit by the subcontractor's employee, even though the general contractor had assigned the entire construction contract to the subcontractor and had removed himself from the project.

*Streets v. Sovereign Constr. Co.*, —Pa.—, 198 A2d 590 (1964). Contractor's hold harmless agreement with the city did not destroy the contractor's immunity as a statutory employer of subcontractor's employee. Subcontractor employee's suit dismissed.

*Baldwin Co. v. Manner*, 224 Ark. 348, 273 SW2d 28 (1954). Text criticism of such decisions noted, but the court said that it is for the legislature to say who is an employer.

*Thomas v. Chambers, Laird v. Chambers*, 183F Supp. 764 (D. Colo. 1960). The injured employee, who had elected to receive workman's compensation benefits under insurance carried by the subcontractor could not maintain a tort action against the principal contractor for injuries sustained.

*Cf. Hayes v. Delaware Valley Steel Fabricators, Inc.*, 201 F. Supp. 954 (E.D. Pa. 1962). The Philadelphia Transport Company let a contract to the Delaware Valley Company, which in turn assigned the contract to the Belanger Company, which in turn subcontracted the entire job to the Hughes Company

— whose employee was injured on the job. The employee brought a third-party action against the Philadelphia, Delaware Valley and Belanger companies. The court held that contractual restrictions on Belanger's freedom of control over the job site, which permitted the Philadelphia Company to continue operations, to do some of the work itself, and to inspect the work, did not destroy Belanger's statutory employer immunity as one having "possession and control" of the premises entered by employees of the subcontractor. Summary Judgment for Belanger sustained.

Objection is made to the reference of N.R.S. 616.060, 616.030, and 616.120 cited at the bottom of page 13 of appellants' brief on the grounds that no such question was ever raised before the trial judge on the three occasions the motions for Summary Judgment were argued. The statutes are no more controlling than the Nevada case of *Nevada Industrial Commission v. Bibb*, cited by the appellants, for reasons as follows:

1. The statutes merely provide a criterion to determine whether or not the employer-employee relationship exists — i.e. the relationship between Mr. McNair and the decedent.
2. There is no question but what the employer-employee relationship existed between the decedent and Mr. McNair, the subcontractor, by reason of the admissions previously noted that the appellants have been accepting Nevada Industrial Compensation benefits based upon the claim that the decedent was acting as the employee of Mr. McNair, the subcontractor, at the time of the accident.
3. The statutes are not contradictory to the immunity statute. The decedent was deemed to be the employee of the principal contractor for the purpose of the act (N.R.S. 616.085). In other words, the



latter mentioned section does not make him an employee as such, but it deems the decedent to have been an employee of the principal contractor even though he was not an employee by statutory definition or otherwise.

### **B. Appellants' Theory That The Rationale Behind The Summary Judgment Was Incomplete**

The reference to N.R.S. 616.060 is merely repetitious of the previous theory in which the statute was previously noted. Again, this statute helps to determine whether or not the employee is an employee of a subcontractor in a case such as this case. To argue that "summary judgment was still improperly given because Douglas Alaparet could not have been an employee of the defendant" has no bearing on the question because N.R.S. 616.085 states that he is deemed to be an employee. Therefore, whether or not he is an employee of the principal contractor is not a question of fact which can even be considered when the decedent is an employee by statute as a matter of law.

### **C. Appellants' Theory That Douglas Alaparet's Relation With The Defendant Was A "Casual" Employment**

The appellants are arguing facts in *de hors* the record. There is no showing that the parties contemplated any contract which would cost less than \$100 in labor costs or that it would take less than ten (10) working days. The reasoning is based upon the fallacy that because the job was commenced and was then terminated by reason of the accident, the total price paid for a partial job would be the criterion to determine whether or not a person is a "casual" employee. Here again, the reasoning is based upon the repetitious supposition that it must be shown or proven that the decedent was, in fact, an employee of the principal contractor rather than an employee as a matter of law. Again, the test is not



whether or not the decedent was an employee of the principal contractor but whether or not he would be deemed to be an employee of the principal contractor. The *Benbow* case, cited by the appellants, is a case involving the question of whether or not there is compensation liability. There is no compensation liability question in this case by reason of the fact that the appellants have been fully compensated by the Nevada Industrial Commission. The appellants' theory that Douglas Alaparet's relationship with the defendant was not in the course of the trade, business, profession or occupation of the latter is of no consequence because it is a statutory relationship. We take issue with the appellants to the effect that they allege that we argued that "independent contractor" equals "subcontractor." The defendant's argument was to the effect that subcontractors, and their employees were deemed to be employees of the principal contractor. The case of *Best v. J & B Drilling Co.* cited by the appellants is a case where Louisiana is in accord with Nevada and the position of the appellee. The affidavit of Lloyd Ralph Lemon (22a, 23a, and 24a of appellants' appendix) sets forth the particular provisions of the contract which provides, among other things, that the pipe be to a depth of 100 feet and "joined with continuous welds" and makes it clear that the purpose of the welding by the decedent was done pursuant to the specifications and requirements of the principal contractor's contract and in fulfilment of the contract. The fulfilling of the contract was the business of the principal contractor. The contractor required that the principal contractor do all necessary repair work. The casing had to be welded in order to carry on the business of drilling the well. Because of the fact that the well casing could not be repaired, the principal contractor did not continue with the particular well and had to abandon it for another site. (Affidavit of Edward Lee Fowler, appellants' appendix 20a, 21a, 22a) The casing was a part of the well. This case should be distinguished from the *Stransbury v. Magnolia Petroleum Co.* case, as cited by the appellants, by reason of

the fact that that case involved a repair to an oil company's derrick rather than to a part of a well. The legal principle that "unless the repair work is of the type that would normally be carried on by the contractee's employees, there can be no employee-employer relationship between the contractee and the injured employee of the contractor doing the work, whether that contractor be considered an independent or a sub" is also a test to determine whether or not the employee is, in fact, an employee and has no bearing if a state statute states that he is deemed to be an employee as previously stated in this brief.

#### **D. The Theory That The Defendant Is On The Horns Of A Dilemma**

Here again, the appellants have still not accepted the fact that the decedent is an employee of the principal contractor by operation of law — i.e. that he is deemed to be an employee of the principal contractor. Inasmuch as he is deemed to be an employee, the fact that he may or may not be an employee, or that he may be a "casual" employee, as to the principal contractor, makes no difference. To state that the repair of casing fractures is beyond and distinct from the business of well drilling is to take unwarranted liberties with the facts. The contract, pursuant to its specifications, required a certain type of weld (Affidavit of Lloyd Ralph Lemon, appellants' appendix 22a and 23a). The specifications required that the principal contractor do all repair work needed to be done to the well whether it was repair work to the casing or to some other part of the well. The Nevada cases of *Simon Service* and *Titanium Metals*, cited by the appellants, support the proposition that an owner can, in fact, be a principal contractor. It doesn't follow that a person who is not an owner cannot become a principal contractor.

### **E. Appellants' Theory That The Appellants Are Only Barred When There Is Someone Acting As A "Subcontractor" To A Principal Contractor"**

The appellants are again taking an unwarranted license with the true meaning and intent of the statutes. Subcontractors and independent contractors are treated the same under the act. Although the appellants might urge the court to adopt a different rule, the court is bound by the construction of the statute applied by the courts of the state of Nevada. The case of *Simon Service Incorporated v. Mitchell*, 73 Nev. 9 307 P2d 110 (1957) at page 113 of the Pacific Reporter citation provides as follows:

"(3) The very purpose of N.R.S. 616.085 is, at least in part, to protect the employees of subcontractors against the possible irresponsibility of their immediate employers by making the principal contractor or principal employer having general control of the construction liable as if he had directly employed every workman on the job. *Bello v. Notkins*, 104 Conn. 34, 124A. 831.

Bearing in mind that the term 'principal contractor' is not defined in the act, let us put into the actual juxtaposition in which they occur, in the original act, Stats. 1947, p. 569, Sections 21 and 22.

'Sec. 21. The term 'subcontractors' shall include independent contractors.

Sec. 22. Subcontractors and their employees shall, for the purpose of this act, be deemed to be employees of the principal contractor.'

Appellant, although it employed no general contractor for the entire construction, did employ, as a separate contractor, the plumbing company to install the sheet metal work, as well as employing other separate contractors for other phases of the

work. Whether these separate and individual contractors are denominated subcontractors or independent contractors would not affect their direct relationships with appellant."

The case of *James E. Walsh v. McDonald Engineering Company of California*, Case No. A 10557 In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, is another Nevada case cited before the Federal Trial Judge. In the *Walsh* case the plaintiff was an employee of one of the subcontractors and he brought an action for injuries against another subcontractor for injuries sustained. The defendant was granted a Summary Judgment against the plaintiff on the grounds that a subcontractor and its employees are deemed to be employees of the principal contractor, and inasmuch as subcontractors would have the same status as employees, and the action could not be brought against a person in the same employ, the action of the plaintiff could not be maintained. The Summary Judgment was granted in 1966. No appeal was taken therefrom.

## V

### ARGUMENT

#### **A. Nevada Has Again Reaffirmed A Rule Comparable To The "Common Employment" Doctrine On Construction Projects**

The equities of the Nevada statute are apparent. The principal contractor is compelled to provide industrial coverage for his employees. In turn, if he subcontracts a portion of the work, or he hires an independent contractor to do the work, the cost of the contracted work is increased because the subcontractor or independent contractor is compelled to bid a higher price by reason of his expenses for industrial compensation premiums paid for and on behalf of his employees. The ultimate cost is passed on to the principal contractor. The employers pay the premiums so that they may

have the protection of the act. Therefore, it is clear that the intent of the legislature of the State of Nevada was to provide the protection for a contractor who will contract with another contractor to do a portion of the work. This encourages specialization in Nevada just as it encouraged specialization in this case. Consequently, the public receives the benefit of better products, better services, and better installations.

Also, all of the contractors on the job receive the protection which they deserve by reason of the payment of premiums.

The applicable portions of the statutes are set forth in the summary to this argument and they provide as follows:

1. That all actions by an employee against an employer providing industrial compensation and its employees are barred by the act. (N.R.S. 616.270)
2. All subcontractors and their employees are deemed to be employees of the principal contractor. (N.R.S. 616.085)
3. Subcontractors include independent contractors. (N.R.S. 616.115)
4. The rights and remedies are exclusive. (N.R.S. 616.370)

It is axiomatic that the Federal courts are bound to follow the interpretation of the Nevada Courts when construing its statutes.

The Nevada Supreme Court has rendered a decision since this appeal was commenced. In the most recent Nevada case of *Tab Construction Company v. The Eighth Judicial District Court*, 432 P.2d 90 (1967), a writ of prohibition was granted by the Nevada Supreme Court in Case No. 5285 after a motion for Summary Judgment was denied on the ground that the Nevada Industrial Insurance Act



provides the full and exclusive remedy. Because the case is so recent and similar the appellee quotes most of the case as follows:

“By the Court, Zenoff, J.:

Petitioner seeks a writ of prohibition to prevent the respondent court from proceeding with a civil action on the ground that the Nevada Industrial Insurance Act provides full and exclusive remedy, and thus, the respondent is without jurisdiction. Respondent does not dispute that Nevada law prohibits this civil suit, but urges that the lower court has jurisdiction to proceed because the action is based on Arizona law, that Arizona law is applicable and does not prohibit the suit.

On April 26, 1967, the petitioner, Tab Construction Company, a Nevada corporation, ‘was the general contractor engaged in construction on the Bonanza Underpass in Las Vegas, Nevada. The Horizontal Boring and Tunnel, Inc., an Arizona corporation, was a subcontractor performing work for the petitioner on the Bonanza Underpass. Christopher J. Giacona, a resident of Arizona, and an employee of Horizontal Boring and Tunnel, Inc., while acting in the course and scope of his employment was injured, and incurred damages therefrom. He brought an action against Tab Construction alleging that negligent conduct on the part of certain employees of Tab Construction while acting in the course and scope of their employment caused the injury to him. Giacona also named as codefendants certain individual employees of the petitioner, Tab Construction . . .

. . . Arizona allows a common-law action against the general contractor in a workmen’s compensation case. This, of course, is contrary to Nevada’s statu-



tory workmen's compensation scheme which prohibits common-law relief in this situation.

1. The Nevada Industrial Insurance Act provides that subcontractors and their employees shall be deemed employees of the principal contractor. N.R.S. 616.085; *Simon Service V. Mitchell*, 73 Nev. 9, 307 P.2d 110, 1957; *Titanium Metals v. District Court*, 76 Nev. 72, 349 P.2d 444 (1960); The petitioner therefore was subject to the provisions of the N.I.I.A., as was the non-objecting plaintiff employee, Giacona. N.R.S. 616.285 and 616.295.

The N.I.I.A. provides that an employer, who accepts the terms of this act which provides compensation for employees, is relieved from further liability. N.R.S. 616.270. Only if the employer fails to provide and secure compensation under this act is the employee allowed to bring an action at law. N.R.S. 616.375.

Under N.R.S. 616.370 the rights and remedies under the act are exclusive and conclusive on both the employer and the employee. Thus, under Nevada law the exclusive remedy in the sense that no other common-law or statutory remedy under local law may be sought by the employee against his employer. *Simon Service v. Mitchell*, supra; *Titanium Metas v. District Court*, supra; *Nevada Ind. Comm'n v. Underwood*, 79 Nev. 496, 387 P.2d 63 (1963).

We observe that the State of Nevada has a legitimate constitutional interest in the application of its own domestic law and policy to a work injury occurring within its borders. *Pacific Employers Inc. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Carroll v. Lanza*, 349 U.S. 408 (1955).

The interest of Nevada in the instant case does not derive solely from the occurrence of the injury

within its borders. Significant is the fact that it is the state of forum. If the forum state is concerned, it will not favor the application of a rule repugnant to its own policies, and the law of the forum will presumptively apply, unless it becomes clear that non-forum incidents are of greater significance. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965).

There are no compelling reasons to displace the domestic law and policies of Nevada. Nevada is the forum state, the place of residence of the general contractor, the place of the work injury, the place where employment exists and is carried out, the place where the general contractor's business is localized, and the place the employees work. All of Nevada's relevant policies of workmen's compensation are vitally involved. We therefore must pay heed and give effect to this interest.

Under the confines of these facts we grant the petition for a writ of prohibition.

Thompson, C. J. and COLLINS, J., Concur"

## VI CONCLUSION

The Nevada Act, by amendment, has adopted the "common employment" doctrine as to construction projects. This doctrine has been followed by the Massachusetts courts. The case of *Bresnahan v. Barre*, 286 Mass. 593, 597, 190 N.E. 815 (1934), is quoted in Larson's Workman's Compensation Law 179 in section 72-32 as follows:

"One purpose of the workman's compensation act was to sweep within its provisions all claims for compensation flowing from personal injuries arising

out of and in the course of employment by a common employer insured under the act, and not to preserve for the benefit of the insurer or of the insurer and those injured liabilities between those engaged in the common employment which but for the act would exist at common law. That is the broad ground underlying the decisions already cited."

It is obvious that the plaintiffs have no remedy against the appellee and that he should not have been subjected to this law suit. The judgment should be sustained. Nevada's policy should be preserved.

Respectfully submitted,

---

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---

### CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing briefs is in full compliance with those rules.

---

ELWIN C. LEAVITT  
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STATE OF NEVADA }  
COUNTY OF CLARK } ss:

On \_\_\_\_\_, before, the undersigned, a Notary Public in and for said County and State, personally appeared ELWIN C. LEAVITT, known to me to be the person described in and who executed the foregoing brief and certificate, who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

Witness my hand and official seal.

---

Notary Public in and for said  
County and State

## PROOF OF SERVICE

STATE OF NEVADA }  
COUNTY OF CLARK } ss:

ELWIN C. LEAVITT, being first duly sworn, says

that on the \_\_\_\_\_ day of \_\_\_\_\_, 1967, he served three copies of the Brief for Defendant-Appellee on Wisti, Jaaskelainen & Shrock, 101 Quincy Street, Hancock, Michigan, by depositing the same in a government mail receptacle at Las Vegas, Nevada, enclosed in a sealed envelope plainly addressed to such persons at the said address, with postage thereon fully prepaid.

---

ELWIN C. LEAVITT

*Attorney for Defendant-Appellee*

229 Las Vegas Boulevard South  
Las Vegas, Nevada 89101

Subscribed and sworn to before me

this \_\_\_\_\_ day of \_\_\_\_\_, 1967.

---

Notary Public in and for said  
County and State





IN THE  
UNITED STATES COURT  
OF APPEALS  
FOR THE NINTH CIRCUIT

---

BRYAN ALAPERET and LAURIE ALAPERET,  
by KAREN ALAPERET, as Guardian ad Litem,  
and KAREN ALAPERET,  
*Plaintiffs-Appellants,*

vs.

No. 22082

W. D. PHELPS, d/b/a PHELPS PUMP  
AND EQUIPMENT COMPANY,  
*Defendant-Appellee.*

---

APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF NEVADA

---

REPLY BRIEF FOR PLAINTIFF-APPELLANTS

---

FILED

DEC 26 1967

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## REPLY TO DEFENDANT-APPELLEE'S BRIEF

Appellants apologize to this Court for omitting the record references to the pleadings and facts upon which diversity jurisdiction in this case is predicated. The apposite references, which were inadvertently omitted from the final typed draft before printing, are the Complaint (Record 6) and the Pre-Trial Order (Record 257).

Appellee has presented certain new matter which will be discussed under the headings used by Appellee in his main brief.

### I.

#### Statement of the Case

On p. 2 of his brief, Appellee states the following proposition (which, in substance, is reiterated on p. 8 under Point C) :

The billing by Mr. McNair was for an uncompleted job and was not a billing for the full amount intended by the contracting parties.

Appellee cites no reference to the record which supports this proposition.

The record does show (17a, Q41), however, that Appellee admitted payment of \$20.00 to Mr. McNair for the repair work. This admission, being uncontradicted and unexplained, gives rise to the presumption that the entire contract price was for that sum.

A case in point is *Benbow v. Edmunds High School*, 67 S.E. 2nd 680, 681 (S.C. 1951) (more fully discussed at 14-16 of Appellants' main brief), which held the employment of the alleged statutory employee to be "casual", saying:

The record does not disclose the amount of time required to repair this light but the *bill* only amounted to \$22.50, *which was paid by the school*.

It is hard to imagine a case more analogous to the present case than is *Benbow*. As Appellee pointedly states (p. 9),



The *Benbow* case, cited by the appellants, is a case involving the question of whether or not there is compensation liability.

The present case presents the same question. If the defendant were liable under the Nevada Compensation Act for Douglas Alaperet's death, then this present action has no foundation. If the defendant were not liable for compensation payments (to which thesis, the Appellants devote their entire argument), then the present action is one contemplated by N.R.S. 616.560 (cited in Appellants' main brief at 9).

That compensation was paid, albeit erroneously, is irrelevant to the outcome of the present case. N.R.S. 616.560 expressly provides that subrogation rights are given to the Nevada Industrial Commission (the insurer on any Nevada compensation claim) in any third party action where compensation benefits have already been paid out. The legislature of Nevada has clearly provided for just such a case, as the present case, by enacting the above statute.

## II.

### Appellee's Point IV (A)

The fifteen cases cited by Appellee (pp. 4-6) are, for the most part, normal applications of "contractor-under" statutes to situations which are factually different from the instant case. *E.g.*, *Best v. J. & B. Drilling Co.*, 152 So. 2d 119 (La. App. 1963) (cited p. 5 of Appellee's brief, extensively discussed pp. 17-29 of Appellants' main brief).

The sole exceptions appear to be the two Federal District Court cases from Pennsylvania, *Kelpfer v. Joyce*, 197 F. Supp. 676 (D. Pa. 1961); *Hayes v. Delaware Valley Steel Fabricators, Inc.*, 201 F. Supp. 954 (E.D. Pa. 1962), which appear to hold that a person may be considered a principal contractor (the statutory employer) even where he contracts out an entire project to another. The two cases are completely contrary to the rule in Nevada that a person who contracts out an entire project to another cannot be a principal contractor (or a statutory employer), but must be regarded as a person who is merely "having the work done". See *Simon Service v.*

*Mitchell*, 73 Nev. 9 (at 13 & 15), 307 P.2d 110 (1957); see also *Titanium Metals v. District Court*, 76 Nev. 72, 349 P.2d 444 (1960). Both of these Nevada cases are extensively discussed in Appellants' main brief at 23-26.

Appellee is also confused as to the scope of the Nevada statutes defining whether employment is "casual" or "not in the course of the employer's business". He states (p. 7):

. . . The statutes merely provide a criterion to determine whether or not the employer-employee relationship exists—i.e., *the relationship between Mr. McNair (the welding contractor) and the decedent* (italics added).

If Appellee means to say that N.R.S. 616.060, 616.030, 616.120 speak only to a common law employment relationship, he is in error. These statutes, which are cited in Appellants' main brief at 13, (and those like them) apply to both common law and statutory employment relationships. Appellants have found no instance where their coverage has been limited to common law employment. See *Benbow v. Edmund High School*, 67 S.E.2d 680 (S.C. 1951), and cases cited therein.

### III.

#### Appellee's Point IV (E)

*Walsh v. McDonald Eng. Co.* No. A 10557 (Nev. Dist. Ct.) (cited Appellee's brief at p. 12), is factually dissimilar to the present case as it involved a third party action between a subcontractor and an employee of another subcontractor on the same project. Under N.R.S. 616.085, subcontractors (as well as their employees) are employees of the principal contractor. Under N.R.S. 616.560, a third party action may not be brought against persons in the "same employ" (i.e., employees of the principal contractor, whether common law or statutory), just as they cannot be brought against the employer.

If anything is clear in the present case, it is that the Appellee-Defendant is neither a subcontractor nor a statutory employee of anyone. His freedom from liability can be predicated only upon the argument that he is the statutory employer of the decedent, Douglas Alaperet. The Argument

in Appellants' main brief (comprising three alternative arguments, pp. 14-22, 22-26, 26-30 respectively) refute any such argument.

It might be noted that in his explanation of the *Walsh* case the Appellee points out (p. 12),

. . . The defendant was granted a Summary Judgment against the plaintiff on the grounds that . . . the action could not be brought against a person in the *same employ*, . . . .

Hence, the holding in *Walsh* seems to be contrary to Appellee's contention that Nevada has adopted the doctrine of "common employment".\*

#### IV.

### Appellee's Argument

In *Tab Const. Co. v. District Court*, 432 P. 2d 90 (Nev. 1967), it should be noted that the plaintiff's employer was expressly denominated a subcontractor to the principal contractor who was sued by the subcontractor's employee.

Hence, the *Tab* opinion is no more than a normal, and correct, application of a "same employ", "contractor-under" statute, like Nevada's, to the case where an employee of a subcontractor, *who is expressly held to be just that*, sues the principal contractor in a third party action. *Tab Const. Co.* follows the *Simon Service* and *Titanium Metals* cases, whose rationale has been so extensively discussed in the Appellants' main brief (pp. 22-26) that further discussion would be redundant, save to note that both these cases support Appellants' position in this appeal.

It might be noted that the *Tab* case does not find it necessary to discuss the three questions which are determinative of this appeal:

\* Of course no matter what interpretation one places upon the *Walsh* case, since it is *nisi prius*, it is not binding precedent upon this court. *King v. United Commercial Travelers*, 333 U.S. 153 (1948), stated:

. . . . It would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

- (1) Whether the Appellee-Defendant was the principal contractor, or merely a person "having the work done", in regard to the repair project (the *Tab* case apparently did not arise out of a contract to repair an object which the principal contractor could not repair himself)
- (2) Whether Harlan McNair was a subcontractor in fact (the plaintiff's employer in *Tab* was expressly found to be a subcontractor and there was no need to interpret N.R.S. 616.115)
- (3) Whether the work engaged in was "casual" and "not in the course of" the alleged statutory employer's business (there is no mention in *Tab* of N.R.S. 616.060, 616.030 and 616.120)

It might also be noted that the term, "common employment", is not mentioned once in the *Tab* opinion. It seems strange that a state would adopt, much less "reaffirm", a rule without mentioning it once in either its statutory or judicial expressions.

---

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

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**United States Court of Appeals  
For the Ninth Circuit**

---

YOUNG CORPORATION a Washington corporation,  
*Plaintiff-Appellant,*

vs.

ROY F. JENKINS, and JANE DOE JENKINS,  
his wife, dba DOROT GRAPPLY COMPANY,  
*Defendants-Appellees.*

---

APPEAL FROM UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

---

**APPELLANT'S OPENING BRIEF**

---

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# United States Court of Appeals For the Ninth Circuit

YOUNG CORPORATION, a Washington  
corporation *Plaintiff-Appellant,*

vs.

ROY F. JENKINS, and JANE DOE JENKINS  
his wife, dba DOROY GRAPPLY COM-  
PANY, *Defendants-Appellees.*

No. 22083

APPEAL FROM UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

## APPELLANT'S OPENING BRIEF

### JURISDICTION

This is an appeal from the judgment of the District Court in an action for Patent Infringement based on 28 U.S.C. Section 1338 (Complaint R-1) and a counterclaim for declaratory judgment (Defendant's Answer R-9) based on 28 U.S.C. Section 2201. There is no issue of jurisdiction, the parties having agreed that the Court has jurisdiction of the parties and the subject matter of the suit (AGREED FACTS — Pre-Trial Order R-18). Title 28 U.S.C. Section 1291 gives this Court jurisdiction of this appeal.

### STATEMENT OF THE CASE

#### A. The Nature of the Controversy

The suit in the District Court was for infringement

of United States Letters Patent, No. 3,082,031, for Two Point Log Grapple (Complaint R-1). A counterclaim for declaratory judgment of invalidity and non-infringement and for relief from business harassment and award of attorney fees and costs was filed by Defendants (Defendants' answer R-9). This appeal relates only to the claim and counterclaim as respects validity and infringement of the patent, and no appeal is taken from the decision of the District Court relating to the portion of the counterclaim dealing with Defendants' claim of business harassment and attorney fees and costs.

### **B. The Parties**

Plaintiff-Appellant, Young Corporation, is a Washington corporation, and has its principal place of business in Seattle, Washington. United States Letters Patent No. 3,082,031, was granted March 19, 1963, to Isaacson Iron Works, assignee of Robert H. Lindberg and was subsequently assigned to Plaintiff Young Corporation.

Defendants, Roy F. Jenkins and Dora (Jane Doe) Jenkins, his wife, are doing business under the assumed name Doroy Grapple Company and are residents of Lebanon, County of Linn, Oregon. Defendants have since the date of issue of the patent, and since receiving notice of said patent sold two point log grapples accurately disclosed in Plaintiff's Exhibit 5, pages 9 and 30 and Figs. 1-3 of Patent No. 3,102,752, page 17 of this Brief, (AGREED FACTS, 10 and 13 — Pre-Trial Order R-18).

### **C. The Pleadings**

The Complaint was filed by Plaintiff, Young Cor-

poration, against Defendants Roy F. Jenkins, and Jane Doe Jenkins, his wife, dba Doroy Grapple Company, on June 30, 1964, and Defendants filed their Answer on August 27, 1964. With their Answer Defendants filed a Counterclaim for a declaratory judgment. Plaintiff filed its Reply to Affirmative Defense and Counterclaim on September 8, 1964. A Pre-Trial Order, approved by the parties and District Court, was lodged August 23, 1965.

#### **D. The Invention of the Lindberg Patent No. 3,082,031 on Appeal**

The invention relates to improvements in devices known as grapples and to devices that belong to the general character of grapples and in particular to grapples used with log loaders known as "heel boom loaders." With this type of loader a log is picked up short of its mid-point by the grapple which is suspended by cables from a boom and the short end of the log is forced against a heeling plate on the bottom of the boom. The log is heeled or pivoted to a desired position and deposited on a truck, railroad car or the like. The grapple which is the subject matter of the patent is characterized as being a two point, scissors type log grapple. The grapple has a horizontal cross-beam and downwardly extending links or legs are secured to opposite ends of the cross-beam.

The jaws are substantially alike and are arcuately shaped. The jaws are pivotably joined to the legs intermediate the ends of the jaws. The lower ends of the jaws engage the logs to be lifted and the upper ends of the jaws constitute lever arms for operating the jaws. The lever arms or upper ends of the arcuate

jaws are pivotally interconnected by a pivot means and one of the lever arms is provided with a pulley or sheave wheel at its upper end.

Two control cables are used in operating the grapple. One of the cables is a lifting cable attached to the cross beam and the other cable is a jaw controlling cable. The jaw controlling cable passes between a double set of guide rollers on the cross-beam and about the sheave wheel on the one jaw then upwardly about a second sheave wheel on the cross beam and downwardly where it dead heads on the upper end of the other jaw. When the grapple is free from a log, it is raised and lowered by the lifting cable. When the grapple is in engagement with a log, the controlling cable causes the jaws to squeeze or clamp the log by hauling in on the jaw controlling cable. The controlling cable also provides the lifting force to raise the log. The jaws are permitted to open by gravity under their own weight by releasing the controlling cable.

Claim 1 of the patent is a combination claim which recites the following elements and the inter-relationship and functional relationship between these elements.

1. A pair of cables
2. A frame structure
3. A pair of legs
4. Two jaws
5. Means to secure one cable to the frame structure
6. Means pivotally securing the legs to the frame and jaws
7. Pivot means interconnecting the pair of jaws
8. The other cable is interconnected to the jaws

The advantages of the patented two point grapple include:

(1) The log loading operation is accomplished by a single operator.

(2) A log can pivot freely between jaws.

(3) Since a log is allowed to freely pivot, the grapple structure maintains its alignments with the load line (controlling cable) eliminating or reducing bending strains in the grapple jaws and legs.

(4) Damage to the log surface of a log is prevented since the log freely pivots between the two gripping jaws.

(5) The two jaw grapple is substantially narrower in width and thus more readily maneuverable than conventional and previously used three or four point grapples when picking up logs from a tangled deck of logs.

### **E. Disposition of the Case by the Court**

At the conclusion of a trial on the merits, beginning February 10, 1966, heard without a jury, the District Court requested that both parties file additional briefs and entered an order on February 11, 1966, taking the case under advisement. The briefs were duly filed and an Opinion was not entered by the District Court until April 12, 1967, along with an order that Defendants prepare Findings of Fact, Conclusions of Law and a Judgment in their favor consistent with the Opinion (R-37). On April 19, 1967, Defendants submitted proposed Findings of Fact and Conclusions of Law to the District Court. The District Court made



extensive revisions to the Findings of Fact and on April 25, 1967, the revised Findings of Fact, Conclusions of Law and Judgment in favor of Defendants were filed, entered and signed by the District Court.

#### **F. The Questions Presented for Determination**

This appeal raises the following questions for appeal:

(1) Does the Jenkins' grapple shown in Plaintiff's Exhibit 5, pages 9 and 30 and Figs. 1-3 of Patent No. 3,102,752 infringe claim 1 of the Lindberg Patent No. 3,082,031, Plaintiff's Exhibit 1?

(2) Are claim 1, 2 and 3 of the Lindberg Patent No. 3,082,031 valid?

#### **SPECIFICATIONS OF ERRORS**

Plaintiff-Appellant contends that the District Court erred in the following respects:

1. In dismissing the Complaint.
2. In holding all claims of Lindberg Patent No. 3,082,031 invalid.
3. In holding that claim 1 of the Lindberg Patent No. 3,082,031 is not infringed by Defendants-Appellees.
4. In concluding that Lindberg agreed that claim 15 of the Lindberg application was not patentable to Lindberg.
5. In concluding that claim 19 of the Lindberg application was rejected on prior art references.



6. In concluding that Plaintiff-Appellant contends that the Lindberg Patent covers all two point grapples.

7. In concluding that Plaintiff-Appellant relies on the doctrine of equivalents to find infringement by Defendant-Appellees of the Lindberg Patent in suit.

8. In comparing a tong structure with a grapple.

9. In concluding that a two point grapple and three and four point grapples are practically identical in construction and mode of operation.

10. In holding that it does not constitute patentable invention to change the structure of the Italian Patent to Giovanetti No. 488,553 from a three point grapple into a two point grapple.

11. In holding that based upon the United States Patent to Hunt No. 512,825 it is obvious to one of ordinary skill in the art, to construct a grapple as recited in claim 1 of the Lindberg Patent.

12. In holding that the only difference in operation between a three point grapple and a two point grapple is one of degree.

13. In holding that the file history of the Lindberg Patent application in the Patent Office shows that the Patent Examiner did not consider a two point grapple to be patentable, and the only way in which Lindberg obtained allowance of claims was to limit them to the constructional details of his particular grapple.

14. In holding that Lindberg did not disregard principals of mechanics in inventing and designing his two point grapple.

15. In holding that the elements recited in claim 1 of the Lindberg Patent are all old and function together in the expected manner to produce the expected result.

16. In holding that at the time that Lindberg made the invention which was the basis for the patent in suit, there was nothing unobvious about his invention to a person having ordinary skill in the grapple art and therefore did not meet the requirements of 35 U.S.C. 103. (Appendix)

17. In holding that the invention covered by the Lindberg Patent is a minor one and the patent is not entitled to any breadth of interpretation.

18. In holding that based upon the file history of the Lindberg Patent claim 1 of the Lindberg Patent is limited to a grapple structure wherein the jaws overlap at their upper ends and are held together by a common pivot pin.

19. In holding that based upon the file history of the Lindberg Patent, claim 1 of the Lindberg Patent is limited to a grapple construction wherein a pulley is mounted on one end of the jaws and around which a controlling cable is reeved.

20. In failing to hold the Lindberg Patent valid based upon the evidence and facts presented during trial and as part of the record on appeal.

21. In failing to hold the Lindberg Patent is infringed by Defendants-Appellees based upon the facts and evidence presented during trial and as part of the Record on Appeal.

## SUMMARY OF PLAINTIFF-APPELLANT'S ARGUMENTS

### A. Infringement

1. Defendants-Appellees infringe claim 1 of the Lindberg Patent as demonstrated by the Trial testimony of Lindberg and the testimony of Jenkins in his deposition.

2. Defendants-Appellees admitted infringement of claim 1 of the Lindberg Patent by copying substantially identical claims in the Jenkins patent application during the Interference proceeding in the Patent Office. Defendants-Appellees argued to the Patent Office that the language of the claim was broad enough to read on any pivot means interconnecting the upper ends of the jaws.

3. There is nothing in the file history of the Lindberg patent application that requires that the doctrine of equivalents be used in reverse to limit the language of claim 1. The clear showing from the file history is that both parties to this suit intended the claim language to encompass the accused grapple structure sold by Defendants-Appellees.

### B. Validity

1. Claim of the Lindberg Patent meets the statutory requirements or validity set forth in 35 U.S.C. 101, 102 and 103. Appendix. The utility of the patented structure has been admitted. There is no evidence to refute the conclusion of novelty. The only prior art patent relied upon by Defendants-Appellees is the Hunt Patent. All of the other prior art patents on grapples teach grapples with three or more jaws.

2. All of the evidence and testimony in the record substantiates that the grapple structure covered by claim 1 of the patent was not obvious to one skilled in the art at the time the Lindberg invention was made. Lindberg testified that experts in the art expressed doubt and disbelief in the two point grapple concept when it was first proposed by Lindberg, hence it was not obvious to the experts. Jenkins is skilled in the art and he urged the Patent Office that the broad concept of his two point grapple was novel and patentable. Further the patented invention was not obvious to several Examiners in the Patent Office who were knowledgeable and skilled in the prior art.

3. The Lindberg invention achieved immediate and substantial commercial success and acceptance.

## INFRINGEMENT

### **A. EVERY STRUCTURAL ELEMENT OF THE COMBINATION RECITED IN CLAIM 1 OF THE LINDBERG PATENT NO. 3,082,031, AND ITS FUNCTION IS PRESENT IN THE JENKINS TWO POINT LOG GRAPPLE**

The drawing of Appellee Jenkins' Patent No. 3,102,752 which issued from patent application Ser. No. 124,190, filed July 14, 1961 is reproduced on page 17 of this Brief. The parties have agreed that the accused two point grapple structure is truly and accurately disclosed on pages 9 and 30 (patent drawings) of the Jenkins patent application Ser. No. 124,190 (AGREED FACTS, 10 and 13 — Pre-Trial Order R-18). Claim 1 of the Lindberg Patent is read on the Lindberg and Jenkins' log grapple structures respectively as follows, with reference being made to the drawings of the Lindberg and Jenkins patent drawings, pages 14-16 and 17 respectively of this Brief.

## Claim 1

Lindberg

Jenkins

A two point, scissors type log grapple wherein the jaws are pivotally mounted to open by gravity and wherein the grapple is operative for its intended purpose in any position of the jaws from fully open to fully closed; a pair of cables to lift and control the operation of said grapple,

32, 35

cable in  
broken line  
and cable 14

one of said cables being a lifting cable

32

cable in  
broken line  
connected to  
clevis on  
crosshead 10

and another of said cables being a controlling cable,

35

14

said grapple comprising a frame structure,

10, 11, 13

10, 16, 18

means interconnecting one of said cables to said frame structure,

33, 34

clevis on  
crosshead 10

said frame structure including a pair of legs

11, 13

16, 18

with a least one of said legs being pivotally connected thereto,

13

16 or 18

said log grapple consisting of only two jaws having upper and lower end portions,

15, 15'

20, 22



said jaws having oppositely facing arcuate log engaging surfaces formed thereon at their lower ends,

arcuate surfaces of 15 and 15'      arcuate surfaces of 28 and 30

pivot means pivotally inter-connecting said jaws above said log engaging surfaces, 16

32 and pivot bolts no numbers

one of said jaws being pivotally connected between said pivotal interconnection and the lower end thereof to the lower end of one of said legs

15 or 15'      20 or 22

and the other of said jaws being pivotally connected between said pivotal interconnection and the lower end thereof to the lower end of the other of said legs,

15 or 15'      20 or 22

the lower end portion of said jaws being in substantial overlapping relationship when the jaws are in fully closed position,

Fig. 6      Fig. 1

said jaws being pivotally connected to the associated legs at points disposed below the pivotal interconnection of the jaws when the jaws are in overlapping position,

Fig. 6      Fig. 1

said jaws including side surfaces at the lower end portions thereof disposed adjacent to the lower por-



tions of said log engaging surfaces,

side  
surfaces of  
15 and 15'

side  
surfaces of  
28 and 30

said side surfaces being disposed adjacent to one another when the jaws are in overlapping relationship,

Fig 6

Figs. 1  
and 2

all of said lower end portion of one of said jaws lying on one side of a plane lying between said side surfaces when the jaws are in overlapping relationship and all of said lower end portion of the other of said jaws lying on the other side of said plane,

Fig 6

Figs. 1  
and 2

the other of said cables being interconnected to at least one of said jaws whereby the paying out of said other cable permits the jaws to open by gravity and whereby the winding in of said other cable causes the jaws to close and apply squeezing pressure against a log therebetween.

35, 38

14, 62

March 19, 1963

R. H. LINDBERG

3,082,031

TWO POINT LOG GRAPPLE

Filed Aug. 25, 1958

3 Sheets-Sheet 1

Fig. 1

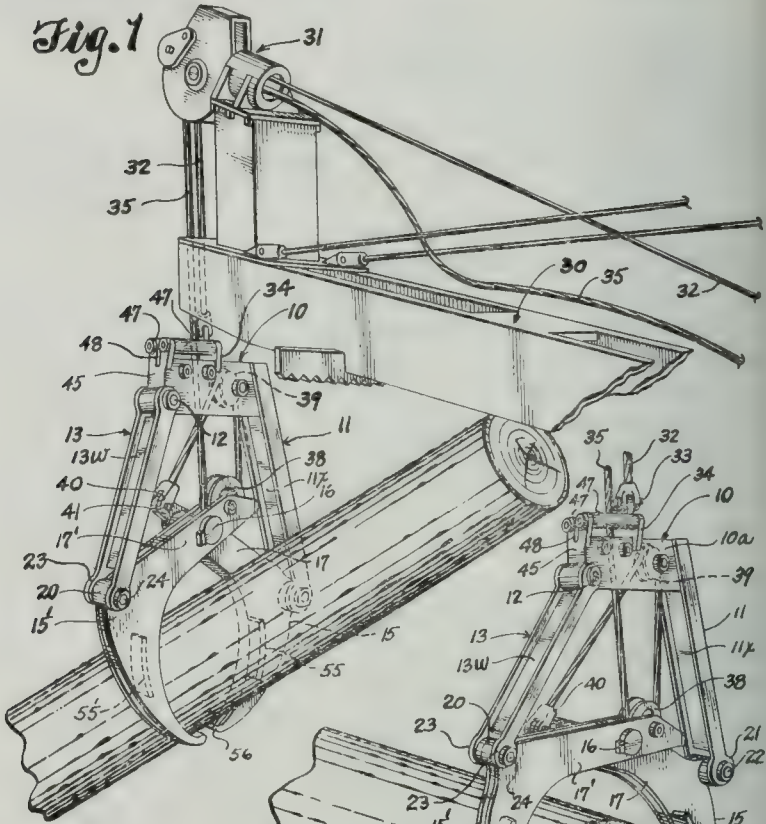
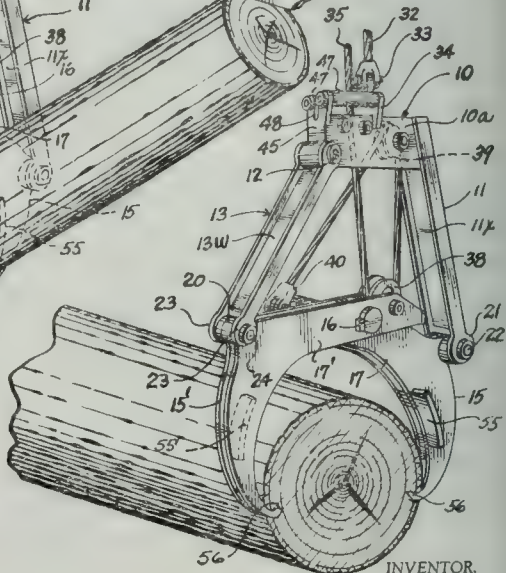


Fig. 2

INVENTOR.  
ROBERT H. LINDBERGBY  
*Robinson & Berry*  
ATTORNEYS

March 19, 1963

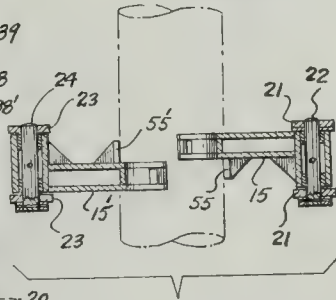
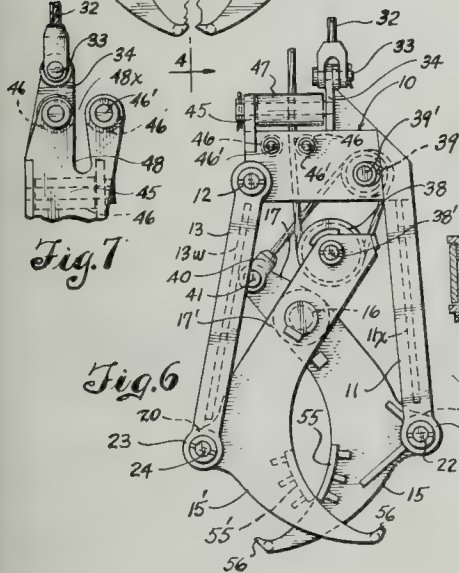
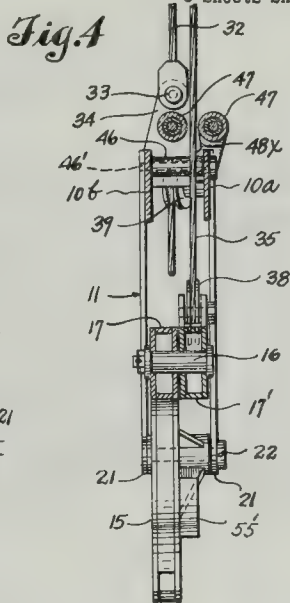
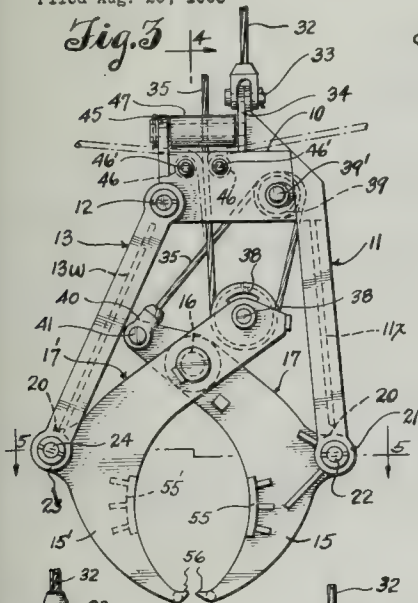
R. H. LINDBERG

3,082,031

TWO POINT LOG GRAPPLE

Filed Aug. 25, 1958

3 Sheets-Sheet 2

INVENTOR.  
ROBERT H. LINDBERG

BY

Robinson & Berry  
ATTORNEYS

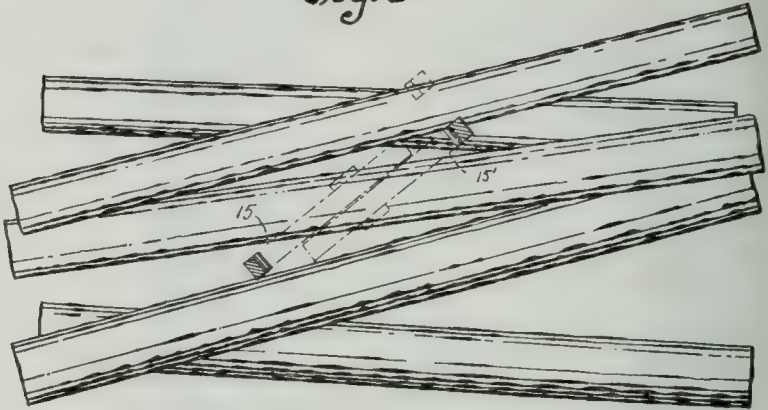
March 19, 1963

R. H. LINDBERG  
TWO POINT LOG GRAPPLE

3,082,031

Filed Aug. 25, 1959

3 Sheets-Sheet 3

*Fig. 8*

INVENTOR.

ROBERT H. LINDBERG

BY

*Robinson + Berry*  
ATTORNEYS

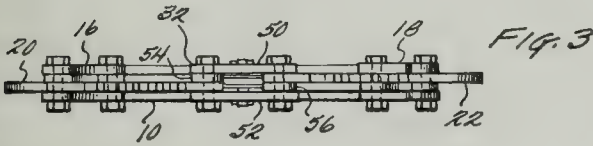
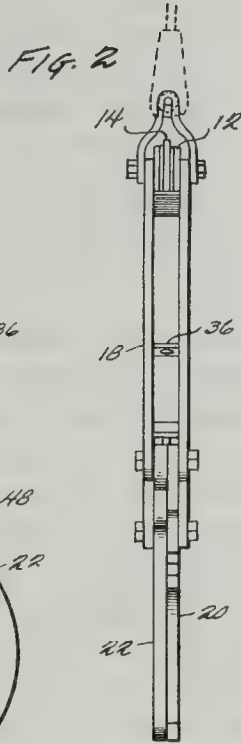
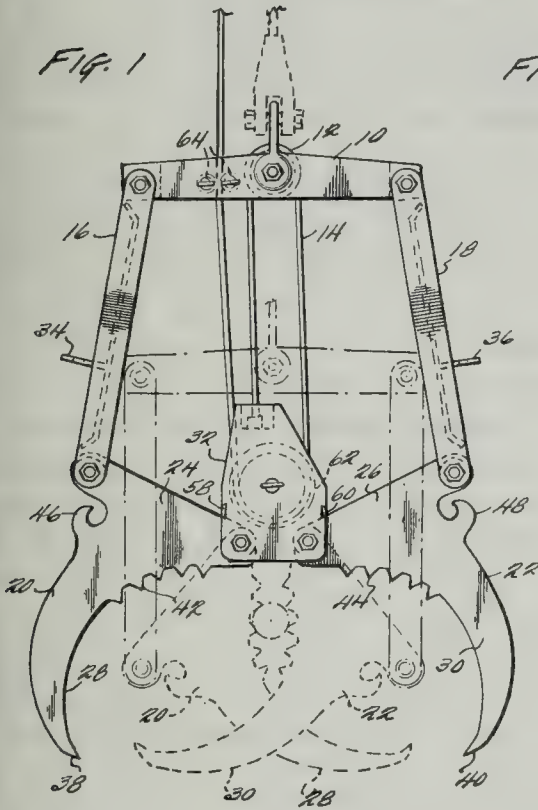
Sept. 3, 1963

R. F. JENKINS

3,102,752

LOG GRAPPLE

Filed July 14, 1961



INVENTOR

ROY F. JENKINS

BY

*Kimmel & Crowell*  
ATTORNEYS

**B. THE FILE HISTORY OF THE LINDBERG PATENT AND THE FILE OF INTERFERENCE NO. 91393 BETWEEN THE PARTIES INDICATE THAT APPELLEES HAVE ON TWO OCCASIONS, ADOPTED THE LANGUAGE OF CLAIM 1 OF THE LINDBERG PATENT TO DESCRIBE THE JENKINS GRAPPLE STRUCTURE AND HAVE ACKNOWLEDGED THAT THE PHRASE "Pivot means pivotally interconnecting said jaws" IS INTENDED TO AND DOES READ ON ANY PIVOT MEANS INTERCONNECTING THE UPPER ENDS OF THE JAWS**

The District Court concluded (Finding of Fact No. 21, R-44) that the accused grapple does not infringe claim 1 of the Lindberg Patent because it calls for "pivot means pivotally interconnecting said jaws above said log engaging surfaces", and for the controlling cable to be "interconnected to at least one of said jaws". The basis for this conclusion is said to be the "teachings and history of the Lindberg Patent", quoting from FINDINGS OF FACT NO. 21 (R-44). Although the Court is correct in relying upon the file history of the patent to interpret the claim language, *Moon v. Cabot Shops, Inc.*, 270 F.2d 539, 123 USPQ 60, 63 (CA9-1959), the Court erred in reaching its conclusion since the history of the Lindberg Patent clearly indicates that Appellant and Appellees, as well as the Patent Office, considered the quoted language as describing the Jenkins grapple.

The quoted language from claim 1 covering the two features referred to by the District Court in Finding No. 21 is the exact language adopted by Defendant-Jenkins to describe these two features during Interference No. 91393 (Plaintiff Exhibit No. 6) between Appellant's patent application Ser. No. 756,866 (Plaintiff's Exhibit 2) which matured into the patent



in suit, and the Jenkins patent application Ser. No. 845,216, (Plaintiff's Exhibit 4) which disclosed a log grapple substantially identical in structure to that shown in Jenkins Patent No. 3,102,752. Claims 6 and 7 (pages 13 and 14 and 17 and 18, Plaintiff's Exhibit 4) of the Jenkins application Ser. No. 845,216 correspond to original Count 1 and proposed Count B respectively of the Interference between the Lindberg and the Jenkins patent applications. The following is a copy of claim 1 of the Lindberg Patent (claim 24 of the Lindberg application) with the *italicized* language being that which was added to claim 19 of the Lindberg application (Count B of the Interference) and the language in parenthesis being the language deleted from claim 19.

1. A two point, scissors-type log grapple wherein the jaws are pivotally mounted to open by gravity and wherein the grapple is operative for its intended purpose in any position of the jaws from fully open to fully closed; a pair of cables to lift and control the operation of said grapple, one of said cables being a lifting cable and another of said cables being a controlling cable, said grapple comprising a frame structure, *means interconnecting one of said cables to said frame structure*, (said structure including a horizontally disposed cross-head to which the free end of one of said cables is secured,) *said frame structure including* a pair of legs (secured to said cross-head and extending downwardly therefrom,) with at least one of said legs being *pivotally connected thereto*, (secured to said cross-head by a pivotal connection,) said log grapple consisting of only two jaws having upper and lower end portions, said jaws having oppositely facing arcuate log engaging surfaces formed thereon at their lower ends, pivot means pivotally interconnecting (the upper ends of) said jaws *above said leg engaging surfaces*, one of said jaws being

pivotally connected between said pivotal interconnection and the lower end of one of said legs and the other of said jaws being pivotally connected between said pivotal interconnection and (thereof to the lower end of) the other of said legs, the lower end portions of said jaws being in substantial overlapping relationship when the jaws are in fully closed position, said jaws being pivotally connected to the associated legs at points disposed below the pivotal interconnection (between) of the jaws when the jaws are in overlapping position, said jaws including side surfaces at the lower end portions thereof disposed adjacent to the lower portions of said log engaging surfaces, said side surfaces being disposed adjacent to one another when the jaws are in overlapping relationship, all of said lower end portion of one of said jaws lying on one side of a plane lying between said side surfaces when the jaws are in overlapping relationship and all of said lower end portion of the other of said jaws lying on the other side of said plane, the other of said cables being enterconnected to at least one of said jaws to open by gravity and whereby the winding in of said other cable causes the jaws to close and apply squeezing pressure against a log therebetween.

Appellees have thus twice adopted the position that the precise language used in claim 1 does in fact describe the Jenkins grapple structure which is now accused of infringement. The record shows that the United States Patent Office considered the counts of the Interference as being readable on both the Lindberg structure and the Jenkins structure.

In a paper entitled "Concurrence In Supplemental Decision and Motions" (item 3, page 59 of the Interference File — Plaintiff's Exhibit No. 6), filed during the Interference proceedings, Appellee Jenkins expressly opposed the broadening of the language in

Count B to call for "pivot means pivotally interconnecting said jaws" rather than "pivotally interconnected to one another" as recited in original Count 1. The argument made was that the language was broad enough to read on any pivot means interconnecting the upper ends of the jaws. Appellant in redrafting the claim language of Count B indeed intended to broaden the language so as to cover any means pivotally interconnecting the jaws. Appellee used the language and acknowledged its breadth and likewise the Patent Office considered the language as reading on both the Lindberg and Jenkins structures. The proper interpretation from the history of the Lindberg Patent can only be that all parties concerned intended the language to describe the Jenkins grapple.

The District Court held, however, that the language, when construed in light of the teachings and history of the Lindberg Patent, requires that the jaws be overlapped at one end and pivotally held to each other by a common pin. The District Court has erred in reaching this conclusion since it is not supported by the evidence. The Court correctly ruled during trial (Transcript of Proceedings, page 72, lines 19-23) that the statements made during the Interference by the party Jenkins are admissible as admissions.

### **C. TESTIMONY OF LINDBERG AND JENKINS**

Referring to the Jenkins grapple, Figs 1 and 2 of the Jenkins Patent No. 3,102,752, page 17 of this Brief, it will be noted that the jaws 20 and 22 do in fact overlap and from a functional standpoint it is immaterial whether the jaws are pivoted on a common pivot or on two separate pivots since the function is the same. At trial, the witness Lindberg testified

(Transcript of Proceedings, page 32, line 2 through page 35, line 25) that each and every element recited in the claims is present in the accused structure and that the elements are in the same relationship and perform the same functions as the corresponding elements illustrated and described in the Lindberg Patent. There was no testimony, either direct or on cross-examination, to refute the conclusion of infringement.

Appellee Jenkins has given testimony that the Jenkins grapple includes every element recited in claim 1 including the two features referred to in FINDING OF FACTS NO. 21, (R-44) and held by the Court as distinguishing the two structures. Jenkins testified that the jaws of the accused grapple are pivotally interconnected by means of a block structure (Jenkins Dep. page 203-205 — Defendants' Exhibit No. 145). As to the controlling cable (closing line) Jenkins testified that it was so interconnected with the jaws that pulling on the closing line (controlling cable) causes the jaws to close (Jenkins Dep. page 203-205 — Defendants' Exhibit No. 145).

**D. THE DOCTRINE OF EQUIVALENTS CANNOT BE USED IN REVERSE TO LIMIT CLAIM 1 IN VIEW OF THE CLEAR SHOWING IN THE FILE HISTORY THAT BOTH PARTIES TO THE SUIT INTENDED THE CLAIM LANGUAGE TO ENCOMPASS THE ACCUSED GRAPPLE STRUCTURE**

The District Court finds that "the range of equivalents to which it (Lindberg Patent) would be entitled is so narrow that it would not encompass the accused grapple (FINDINGS OF FACT NO. 20, R-43-44). The Court is in error in this holding since the



Doctrine of Equivalents is not applicable to the present case.

Claim 1 reads directly on the Jenkins grapple and there is an identity of *means, operation* and *result* as established by the testimony of Jenkins and Lindberg. It is not necessary to place any interpretation on the language of claim 1 other than the plain meaning of the language and the interpretation placed thereon during prosecution of the Lindberg application before the Patent Office in order to encompass the accused grapple. Plaintiff is not relying, nor is it necessary to rely, on the Doctrine of Equivalents in order to broaden claim 1 to read on the accused device. As demonstrated supra, claim 1 reads directly, element-for-element, on the accused grapple without broadening or stretching the terms. Likewise there is no basis for limiting the claim so as to exclude the Jenkins structure since the file history indicates that all parties concerned (Lindberg, Jenkins and the the Patent Office) intended the claim to encompass the Jenkins grapple. There is nothing in the file history of the patent which would place further limitations on the language of claim 1.

## VALIDITY

### A. NOVELTY — PRIOR ART, SCOPE AND CONTENT

The District Court held (FINDINGS OF FACT No. 10, R-42) that the Examiner in the Patent Office correctly stated that it would not amount to patentable invention to change a three point grapple into a two point one. The Court erred in this conclusion since the patent Examiner did allow claim 24 of the Lindberg patent application which was claim 19 (Count B of the Lindberg-Jenkins Interference)

amended to slightly broaden its scope and to correct a typographical error.

The Italian Patent to Giovanette No. 488,533 (Defendants' Exhibit No. 123) as well as Plaintiff's own three and four point grapple structures were before the patent Examiner, (Plaintiff's Exhibit 2, pages 22-29) as representing the prior art.

Furthermore, the questions of anticipation and obviousness were considered at great length by the Patent Office during the prosecution of the Lindberg application and during the course of the Interference proceeding involving the Lindberg and Jenkins applications. The file history of the Lindberg application (Plaintiff's Exhibit No. 2, page 89) indicates that the Examiner made an extensive and thorough search of the prior art. Both the Lindberg application file history and the Interference file (Plaintiff's Exhibit No. 6) attest to the fact that the question of obviousness was considered at great length. Two Assistant Examiners and one Primary Examiner were involved in consideration of the Lindberg application. The Examiners had all manner of tongs, hooks, and grapples before them and, like Defendants, found no teaching of the concept or structure of a two jaw grapple with overlapping jaws as recited in claim 1. That the decision of the Patent Office Examiner should be given significant weight so as to strengthen the presumption of validity in the instant case is both logical and compelling. This logic is applied in the Ninth Circuit, see *National Sponge Cushion Co. v. Rubber Corp.*, 286 F.2d 731 at page 735.

The file wrapper of the Lindberg application also indicates that the Examiners were personally interviewed several times by the inventor Lindberg and



his attorney and the Examiners had full knowledge of the background of the art and operation of grapples. This was not a case of dealing at arms length or a mere academic approach to the question of invention. The personal interviews further substantiate the fact that the claims of the patent underwent a thorough prosecution and the patent was not lightly granted by the Patent Office. The presumption of validity is therefore strengthened and the Court should not lightly hold the patent invalid. See the recent decision in *Abington Textile Works v. Carding Specialists Ltd.*, 148 USPQ 33, (D.C. Dist. of Col — 1965) at page 47.

It was admitted by the attorney for Defendants-Appellees that the Hunt Patent (Defendants' Exhibit 103) is the best reference and that "all of these other patents were put in there for the purpose of showing how crowded the art is" (Transcript of Proceedings, page 107). With respect to the Hunt Patent, Lindberg testified (Transcript of Proceedings pages 112 and 113):

Q. (By Mr. Berry) Mr. Lindberg, do I understand your testimony as to 103, that in a side view, the grapple structure as illustrated in Hunt's would be similar to that illustrated in Harrington's, Defendants' Exhibit 111?

A. In that, it would show multiple teeth on each side — the Harrington's.

Q. Do they have any general terms they refer to a grapple of this type as?

A. There are a number of terms.

Q. In your opinion, assuming that D-103 has a plurality such as D-111, could such a device be used commercially for heel boom loading operations?

A. Not any more effectively than any multiple point device.

Q. Could the log freely pivot between the jaws?

A. No.

Q. Could the jaws grab a small log?

A. No.

There was no evidence or testimony to contradict the witness Lindberg's conclusion that Hunt does not show a two point grapple. Although "Even one prior art reference which has not be considered by the Patent Office may overthrow the presumption of validity", *Dresser Industries Inv. v. Smith-Blair Inc.* 9 Cir., 1963, 322 F.2d 878, a reading at column 2 on page 888 of the decision indicates that the reference must also be "pertinent". The Hunt Patent is no more pertinent than the Giovanetti Patent or Plaintiff's three and four point grapples which the Patent Examiner considered.

The District Court erred in its statement in the Opinion, page 2, paragraph 3, wherein it states "The interference was dissolved after both parties agreed that neither claim was patentable." It is true that Lindberg cancelled claim 15 and moved to insert new claims 18, 19 and 20 as Counts A, B and C. Claim 19 (Count B of the Interference) was considered by the Examiner to be allowable. (Plaintiff's Exhibit 2 — page 74). The claim was not approved for entry in the Lindberg application nor as a Count of the Interference because it was not patentable to Jenkins for the reason that the Lindberg structure had been in public use more than one year prior to Jenkins' filing date. The Examiner stated that "... Count B is not patentable to all parties to the Interference". (Plain-

tiff's Exhibit 2, page 74). Lindberg subsequently inserted claim 24 in his patent application which is a slight revision and broadening of claim 19 (Count B of the Interference) and this claim is claim 1 of the Lindberg Patent. Claim 24 is very similar to claim 15. Lindberg never conceded that the grapple structure recited in claim 15 was not patentable.

## B. UTILITY

The utility of the Lindberg two point grapple has been admitted by Defendants-Appellees and acknowledged by the District Court (Transcript of Proceedings, pages 159 and 160):

THE COURT: Do you have anything else, Mr. Berry?

MR. BERRY: Your Honor, I have nothing to say in my closing statement except to point out to the Court that even the Defendants in this case acknowledged the merits of the two point grapple over a three point grapple. You will find in the Jenkins' deposition —

THE COURT: What was that?

MR. BERRY: In the Jenkins' deposition, Your Honor, which is Plaintiff's Exhibit 7, at page 90, Mr. Jenkins acknowledged that the two point grapple had an inherent advantage over a three or four point grapple.

THE COURT: I don't think there is any question about that, is there?

MR. BERRY: This was also confirmed at page 38 of the Hoxie deposition.

THE COURT: What difference would that make?

MR. BERRY: Your Honor, the fact that two point grapples — three and four point grapples

cannot be used as substitutes —

THE COURT: Everybody has been agreeing to that.

MR. BERRY: I wasn't aware of that Your Honor. I have no further remarks.

### C. NONOBVIOUSNESS — THE LINDBERG INVENTION WAS NOT OBVIOUS TO ONE HAVING ORDINARY SKILL IN THE GRAPPLE ART AT THE TIME OF THE INVENTION

The Supreme Court has recently stated in *Graham et al. v. John Deere Co. of Kansas City, et al.*, 383 U.S.1, 12, 148 U.S.P.Q. 459, 464-465 and *United States v. Adams et al.*, 383 U.S. 39, 148 U.S.P.Q. 459, that patentability is dependent upon three explicit conditions: novelty and utility as defined in 35 U.S.C. 101, 102 (1964), and nonobviousness, as defined in 35 U.S.C. 103 (1964). Although the obviousness or nonobviousness of the subject matter is a question of law, that legal question must be determined against a factual background, *National Lead Company v. Western Lead Products Company*, 9 Cir., 291 F.2d 447, 450-451. The *Graham* case also particularized the factual inquiries to be pursued in providing a basis for determining the question of obviousness or nonobviousness with the meaning of section 103 as being:

(1) the scope and content of the prior art are to be determined;

(2) difference between the prior art and the claims at issue are to be ascertained; and

(3) the level of ordinary skill in the pertinent art resolved. The Court also stated in the *Graham* case:



“Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy” (383 U.S. at 17-18, 148 U.S.P.Q. at 467)

This Court has had occasion to review and apply these principles in the recent decisions in *Jeddeloh Brothers Sweed Mills, Inc. v. Coe Manufacturing Company*, 9 Cir., 306 F.2d 455, 151 U.S.P.Q. 679, and *Hensely Equipment Co., Inc. v. Esco Corp.*, 9 Cir., 375 F.2d 432, 152 U.S.P.Q. 781. It is thus clear that the obviousness or nonobvious of the Lindberg invention must be decided according to these principles.

The two point grapple structure of the Lindberg Patent is designed for use with log loaders known as “heel boom leaders”. The various steps involved in a heel boom loading operation are illustrated on page 40 of this Brief. Referring briefly to the drawings, the grapple 2 is suspended by cables 3 from a heel boom 4 and a log 5 is engaged short of its mid-point by the grapple 2 as shown in Fig. 1. As the log is lifted it pivots and the short or inner end 5a of the log is forced against a “heeling” plate on the bottom of the heel boom 4, Fig. 2. Upon further lifting of the grapple and log, Fig. 3, the log is caused to pivot again (within the grapple) so as to elevate the long or outer end 5b and is swung to a position above a waiting truck 6. The log is deposited on the truck by lowering the long end 5b to rest on the truck bed (thereby pivoting the log within the grapple for the third time), Fig. 4. The short end 5a of the log is then lowered to the truck bed (pivoting the log within

the grapple for the fourth time) paying out the cables 3, Fig 5.

At the time the Lindberg invention was made, early in 1958, tongs and grapples were generally well known in the logging art. Log loading tongs had been used in heel boom loading for many years, however, there is a serious objection to use of tongs because they rely on opposed points to hold the log. The points of the tongs must penetrate the log thereby often causing serious damage to the log (see Wirkkala Patent No. 2,786,709, Defendants' Exhibit 117). Many loggers preferred to use grapples over tongs because grapples did not depend on penetrating points which damage the log but, rather, employ a lateral squeezing action to grip the logs. Because of this, several logs can be lifted at once and the size of the log which can be lifted may vary from a few inches in diameter to several feet. Another advantage of grapples is that a single operator can perform the job. Tongs on the other hand, have no "squeeze" or "grip" but depend solely upon the digging in of sharp points from which the log "hangs" and tongs must be manually positioned in relationship to the logs, thus requiring at least two men for operation. Tongs are completely inoperative if the log penetrating points are removed.

The problem with grapples which existed at the time of the Lindberg invention was that multiple, spaced jaws were used on at least one side of the grapple to obtain the "balanced" squeeze or grip thought to be necessary to lift a load and to keep it from twisting. When using the three and four jaw grapple for heel boom loading, the log was not free to pivot between the jaws either when the jaws overlapped or when the points of the jaws actually en-



gaged the sides of the large logs. The damage to logs was thus often as great with grapples as with tongs and damage to grapples frequently occurred because of bending stresses resulting from improper alignment of the grapple with the heel boom and operating cables.

As the witness Hoxie (a witness for Defendants-Appellees) testified in part (Hoxie Dep. Pages 34 and 35, Defendants' Exhibit 124).

Q. Mr. Hoxie, will you explain to me what some of the deficiencies are of 3 and 4-point grapples in use in log loading.

A. 3 and 4-legged grapples are all right in deck work or such as that, but to work under a heel boom, why, your 3-point grapple, you are putting an extra strain on your grapple.

Q. On what portion of the grapple?

A. On whichever leg is closest to the boom. That is the one that your leverage is on.

Q. Have you ever seen a 3 or 4-point grapple that was damaged because of this extra strain?

A. I think I have seen grapples in pretty near every shape, manner or form damaged.

Q. Some of the damage at least has resulted from extra strain put on additional points or legs?

A. Because they were not properly designed.

Even with these deficiencies, the grapple provided the advantage of eliminating at least one man in an operation, loading was safer, more rapid and inexpensive.

Because of the basic principle of grapple operation is that of a "lateral squeeze", the concept of grapple structure at the time of the Lindberg invention was

that of a "balanced grip", i.e. the jaws had to be so positioned as not to create a twisting moment on the logs. The balanced grip or balanced force concept is illustrated in the top figure on the drawing on page 41. Thus the lines of force applied by opposing jaws of a multiple jaw grapple were balanced as illustrated by the three point grapples shown in certain of the patents of record in this suit. (Defendants' Exhibits 114 and 123) and the Young three point grapple (Plaintiff's Exhibit 36). The concept of "balanced grip" is still the prevailing concept in three and four point grapples as well as multiple point basket type grapples used in lifting heavy loads where "heeling" is not involved. It is also the prevailing concept in the case of log loading tongs where "heeling" is involved.

The Lindberg concept of grapples for use in heel boom loading of logs was a radical departure from the prevailing concept at the time of the invention. The Lindberg grapple embodies only two jaws which are offset and overlap in a scissors-like action when the grapple is closed, thus providing a "lopsided" or "unbalanced" grip on the log. The offset or overlapping feature permits the jaws to operate with a true grapple action and, in addition, free pivoting of the log between the jaws is permitted and is possible because of the use of *only* two effective points of contact. If the jaws of a two jaw grapple were to be aligned to provide true "balanced grip", the jaws could not overlap and it would be impossible to "squeeze" the smaller logs between the jaws. It was not obvious that a structure with "unbalanced grip" would operate satisfactorily in the handling and loading of logs since the apparent or expected result would be loss of control of the log through canting or twisting of the log because of the turning moment

imposed by the jaws of the grapple on the log and consequent damage to the grapple because of the expected twisting action. The dotted line portion of the bottom figure of the drawing on page 41 illustrates the expected twisting action of the log. This was the general concensus of opinion of experts in the field who expressed disbelief in the invention when the two jaw grapple was first introduced. On this point the Witness Lindberg stated on direct examination by the attorney for Defendants-Appellees. (Lindberg Dep. Pages 12-14, Defendants' Exhibit 143):

Q. When you first had your concept in the beginning of 1958, did you discuss that with anyone?

A. Yes.

Q. With whom?

A. Our sales manager in Oregon.

Q. Who was that?

A. Mr. Eugene Wygant.

Q. Where is he?

A. In Eugene.

Q. Is he still your sales representative? I can't hear you.

A. Yes.

Q. When did you have this discussion with Mr. Wygant?

A. The first part of 1958.

Q. In Eugene or in Salem — I mean in Eugene or Seattle?

A. Over the telephone.

Q. He was in Eugene?

A. Correct.

Q. And what did you explain to him? Give me the substance of your conversation as best you can recall.

A. I can't give it to you exactly, but we had this idea — I had this idea and I explained to him what we should do and how to do it, and we agreed that it would be worth trying.

Q. Well, can you tell me what you told Mr. Wygant?

A. No.

Q. When you say you had this idea, what did you tell him?

A. Basically that a 2-point log grapple would work for heel boom loading.

Q. Had you ever tried it?

A. Not with a grapple, not with a 2-point grapple, no.

Q. — grapple?

A. No, this was when we got the idea of doing it.

Q. Did someone suggest to you previous to that, that this might be a feasible way of heel boom loading?

A. No.

Q. When you suggested this to Mr. Wygant, what did he say?

A. Well, there was some question that it might twist the log — or there were enough unknowns at that time that nobody was sure of this thing.

Q. Did Mr. Wygant indicate that he didn't think it might work?

A. That's what I said, yes.

Q. But you didn't make any models?

A. No.

Q. And I take it you went right into the production?

A. Correct.

Q. But you still had doubts whether it would work?

A. We had — we felt that it would work, but we had not done it before so we had to produce and make one to prove to ourselves that our concept would do the job, which is what we did.

The Supreme Court in the *Adams* case, *supra*, in upholding a combination patent for a wet battery held that the combination was nonobvious because, to conceive the combination required a person reasonably skilled in the art to disregard long accepted principles in the science (art). This reasoning also supports the view that the Lindberg two point grapple was not obvious at the time of the invention since he disregarded the accepted concept or principle of “balanced” grip in grapple loading. The District Court erred in its finding that Lindberg did not disregard accepted principles of mechanics (FINDINGS OF FACT No. 14, R-43) since the evidence shows that, with respect to the grapple art, he did disregard the accepted principles.

The two jaw grapple did operate successfully in heel boom loading and its significance has been recognized. It has become the predominate grapple structure for heel boom loading. On this point the Witness Lindberg stated (Transcript of Proceedings page 57):

Q. Mr. Lindberg, for use in heel boom loading, do you know what the approximate percentage is of the total loading devices that are used in heel boom which comprises two point log grapples?

A. Our own experience in our company is that over



eighty percent of our total grapple sales are two point grapples.

Q. Do you have any knowledge as to whether two point grapples are used for any other purposes other than heel boom loading?

A. They can be. But, they are primarily used for heel boom loading.

Q. Do you know whether it is common today to use three or four point grapples for heel boom loading?

A. It's not common. Three and four point grapples are used for straight crane loading where you want to balance the load.

Also the witness Hoxie testified (Hoxie Dep., Defendants' Exhibit 124, page 36, line 5 to page 37, line 8):

Q. Do I understand your own testimony, then, that the use of a two-point grapple as distinguished from a 3 or 4-point grapple in heel boom logging has very definite advantages?

A. In heel boom logging the 2-point grapples are definitely better than 3 or 4 point.

Q. Mr. Hoxie, I understand that you have recently had an illness. That is correct, isn't it?

A. Yes, that is correct.

Q. Prior to your recent illness how were you employed, at what work?

A. I was logging, cat skinner.

Q. During this most recent employment did you have the occasion to see grapples in use?

A. Yes.

Q. What type of grapples were they? I mean I am



distinguishing between the number of points now.

A. 2 points.

Q. Do you recall in recent years seeing 3 and 4 point grapples in use in heel boom loading?

A. Yes, but not satisfactorily.

Q. Do you recall seeing 3 and 4-point grapples in use for what you termed decking?

A. Yes, they are still in use.

Q. Do the 3 or 4-point grapples have advantages over the 2-point in a decking operation?

A. Not necessarily. Mostly it is the price.

Q. The 3 and 4-point are more expensive, are they?

A. The 3 and 4-point are cheaper. They can pick them up on the second-hand market for pennies.

The commercial success and wide acceptance of the Lindberg two point grapple is also demonstrated by fact that two principle manufactures, Dommion Bridge Co., Ltd. and Albin Manufacturing Co., Inc. took licenses from Plaintiff, Young Corporation, (Plaintiff's Exhibit 32 and 33).

The many known advantages of grapple loading plus the added advantages of easily grabbing and pivoting of large and small logs were thus made available in heel boom loading without the attendant disadvantages which had existed in the prior art. The Lindberg two jaw grapple utilizing "unbalanced grip" constitutes an improved operable structure which eliminates the disadvantages of both tongs and prior art grapples and yet combines the advantages of both.

The very history of the use of tongs for heel boom log loading, experiments with hooks and the like and finally the almost complete shift to the use of grapples illustrates a long search by the industry for an acceptable, safe and efficient means for heeling logs. This search did not end until Lindberg made the final contribution. The elimination of waste by elimination of damage to valuable logs as well as to grapple structure, the wide acceptance of the two jaw grapple by the industry; these factors, although not in themselves controlling, are indicia of actual invention and are properly considered, *Graham* case supra, and *National Sponge Cushion Co. v. Rubber Corp.*, 286 F.2d 731, at page 735, 128 USPQ 320 (CA9-1961).

Defendants-Appellees claim that the Lindberg invention was a limited improvement in a crowded art. Although Defendants listed some twenty-three patents as representative of the prior art, (Defendants' Answer, R-10 and 11, Pre Trial Order, R-33) it is to be noted that the patents include not only grapples but also tongs, hooks and even buckets. The art cited covers a period of almost ninety years. This alone does not establish or even suggest that the art pertaining to log loading grapples or grapples in general is crowded or that Lindberg's invention was insignificant. None of the patents cited, including the patent to Hunt relied upon as the sole anticipating reference, teach the use of an "unbalanced grip" in heavy lifting devices as does the Lindberg two jaw grapple with overlapping jaws. It is clear from inspection that the Hunt patent teaches a balanced grip, multiple jaw grapple for use in dredging and the only expert testimony on the patent supports that conclusion (Transcript 112 and 113).

The basic question then is not merely whether the art is "crowded" or how many patents are classified in a given art but whether or not the invention embodies significant and substantial advantages or improvements in the art. This can be measured by indicia such as commercial success, wide spread acceptance in the industry and copying by others. Defendants-Appellees take the position that the improvement was a limited one in a crowded art. The wide acceptance of the two jaw grapple and Defendant's own adoption and preference for the structure, however, belies this position.

FIG. 1

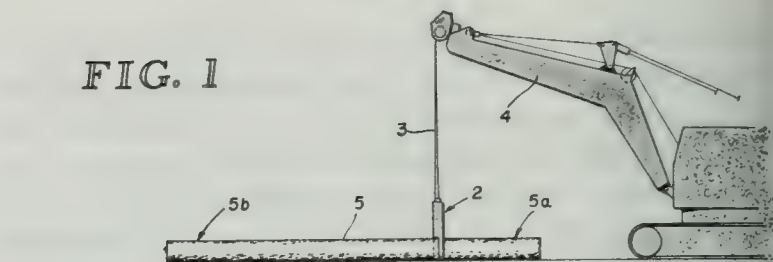


FIG. 2

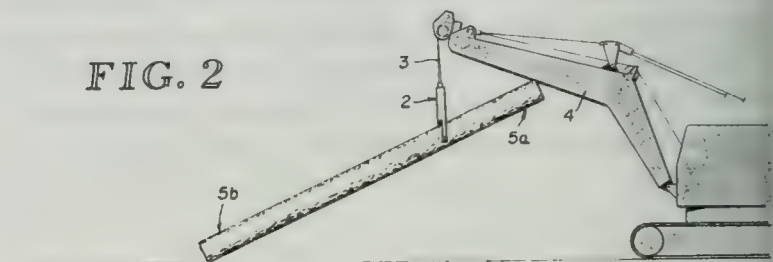


FIG. 3

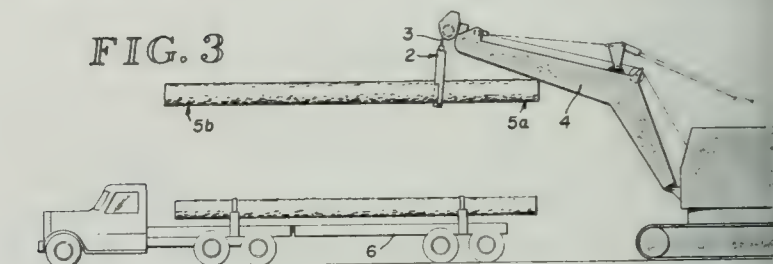


FIG. 4

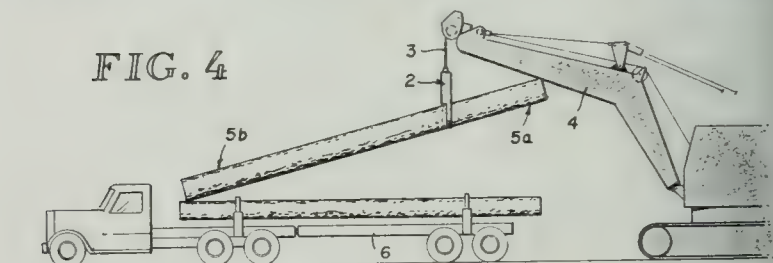
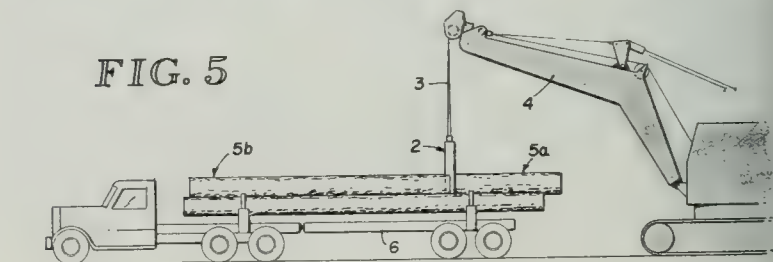
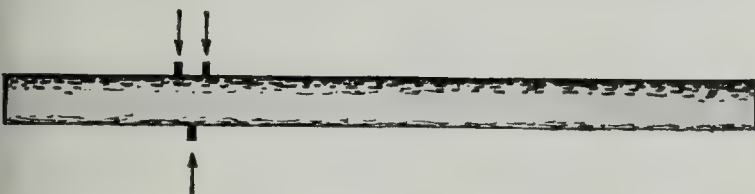
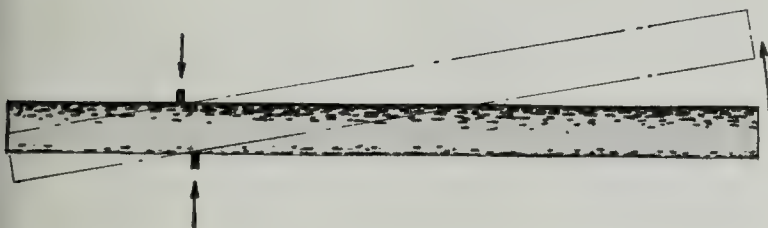


FIG. 5





**D. DEFENDANTS-APPELLEES HAVE FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY THAT ATTACHES TO THE LINDBERG PATENT AND TO SUPPORT THE BURDEN OF PROVING INVALIDITY**

Defendants-Appelless rely on one patent, the Hunt patent, as being the only pertinent reference against claim 1 of the patent in suit. Lindberg testified in detail at trial, as an expert witness, to the effect that the Hunt patent does not show a two point or two jaw grapple. The Hunt patent is thus no more pertinent than the prior art considered by the Patent Examiner. Defendants-Appellees offered no evidence to refute or discredit this expert testimony nor was any evidence offered in the way of expert testimony concerning any of the prior art references that were before the District Court and Patent Examiners. Only argument of counsel was offered on the point of content and scope of the prior art patents. Argument of Counsel is not entitled to evidentiary weight.

On the question of obviousness under 35 U.S.C. 103, Plaintiff-Appellant introduced the Deposition of the party Lindberg to the effect that at least one other person, Mr. Eugene Wygant, a sales and field representative of Young Corporation and one skilled in the grapple art, did not think the two point grapple concept was the obvious approach or answer to the problems experienced in the use of grapples. No testimony nor evidence to the contrary was offered to disprove this fact.

Likewise there is no evidence to counter the fact that the party Jenkins himself copied the claim language describing a two point grapple. Mr. Jenkins is undoubtedly an expert in the grapple art and it did not



appear obvious to him at the time of the invention or he would not have tried to make the claim.

There is nothing to disprove that at least three Examiners in the Patent Office, all experts in the art, did not consider the invention unobvious since they approved and issued the Lindberg Patent. Reference is made to the Examiner's opinion on patentability of the Lindberg claim as clear proof of his position (Plaintiff's Exhibit 6, pages 41-52). The Examiner who wrote the opinion noted was the same Examiner who handled the application during Ex Parte prosecution.

In the final analysis the real question is whether or not the invention was obvious to one skilled in the pertinent art. The evidence shows that it was not obvious to Lindberg, Jenkins, Mr. Wygant, and three Patent Examiners. Defendants-Appellees must overcome this clear evidence with something more than argument in order to overcome the presumption of validity and to meet the burden of proving invalidity.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A true copy of the within Appellant's Opening Brief has been sent to J. Pierre Kolisch, Kolisch and Hartwell, 1004 Standard Plaza, Portland, Oregon 97204, as attorney for Appelles' by United States mail this 5th day of September, 1967.

BENJAMIN F. BERRY

*Counsel for Plaintiff-Appellant*

**CERTIFICATE OF COMPLIANCE**

I certify that, in conenction with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

BENJAMIN F. BERRY

*Counsel for Plaintiff-Appellant*

## Appendices



## APPENDIX

### **35 U.S.C. 101 Inventions Patentable**

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

### **35 U.S.C. 102. Conditions for Patentability; Novelty and Loss of Right to Patent**

A person shall be entitled to a patent unless —

(a) the invention was known or used by others in this country; or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

\* \* \*

### **35 U.S.C. 103. Conditions for Patentability, Non-obvious Subject Matter**

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.





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**United States Court of Appeals  
For the Ninth Circuit**

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YOUNG CORPORATION, a Washington Corporation,  
*Plaintiff-Appellants,*

vs.

ROY F. JENKINS, and JANE DOE JENKINS,  
his wife, dba DOROY GRAPPLE COMPANY  
*Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF OREGON

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**APPELLANT'S REPLY BRIEF**

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OCT 23 1967



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United States Court of Appeals  
For the Ninth Circuit

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vs.

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JENKINS, his wife, dba DOROT  
GRAPPLE COMPANY,  
*Defendants-Appellees.*

No. 22083

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF OREGON

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APPELLANT'S REPLY BRIEF

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VALIDITY

A. THE PRIOR ART DOES NOT SHOW A TWO  
POINT GRAPPLE

On page 6 of their Brief, Defendants-Appellees refer to the District Court's Findings (Finding 8, R42) as being to the effect that *two point grapples* as well as two point tongs are very old and shown in the prior art. In other portions of their Brief (page 2, line 16 and page 4, line 10) Defendants-Appellees seek to equate tongs and grapples and to infer that *two point grapples* are shown in the prior art. Further, on page 6 of their Brief, it is stated that the

read and prevent it from  
The Wirkkala patent, 2,786,709  
hibit 117) and the Collom et al pat  
fendant's Exhibit 112), discussed o  
Defendants-Appellees' Brief, were  
Examiner and considered in detail  
cution of the Lindberg patent a  
tiff's Exhibit 2, pages 15 and 30).  
and Collom et al devices are to  
function quite differently from g  
noted that these devices do not uti  
for exerting a strong lateral "sc  
on the object being lifted as in the  
The cable 8 of Collom et al and the  
kala operate to open the jaws ra  
them. In the case of prior art log  
which the Wirkkala patent is an  
the jaws are provided with sharp  
points 12 of Wirkkala, which dig  
the log and which must be manuell  
The log actually "hangs" from th

With regard to the showing of

512,825 (Defendant's Exhibit 103), characterized by Defendants-Appellees' attorney as being the "best reference" (Transcript of Proceedings, page 107), it is argued that Fig. 2 thereof shows a two point grapple (Defendants-Appellees' Brief, page 7). This interpretation is in error since Fig. 2 of the Hunt patent shows an end elevation of the bucket or basket type grapple shown in side elevation in the other figures of the drawing. The Court's attention is invited to the fact that two sets of two links F are indicated (referring to the two "F" notations on the left side of Fig. 2) which means to one familiar to mechanical drawings that the same frame structure is utilized with the legs A' as is used with the bucket elements A. This means, of course, that there are at least four of the elements A' making up what is known to the art as a "basket" type grapple and certainly not a two point grapple. To say that the Hunt patent, Fig. 2, shows a two point grapple would be the same as saying that Fig. 1 of the patent to Harrington (Defendant's Exhibit 111) shows a two point grapple. It is error to call a basket grapple a two point grapple simply because only the two end jaws are revealed in an end elevational view.

Although the structure shown in the Hunt patent is relatively simple, the manner in which it is presented in the drawings tends to be confusing and lacks clarity. The uncontradicted testimony of the witness Lindberg (Transcript of Proceedings, pages 112 and 113) is therefore appropriate and, if Defendants-Appellees desired to substantiate a different interpretation, this testimony should have been contradicted.

Counsel's argument (Defendants-Appellees' Brief,

page 8) that the Patent Office "overlooked" Plaintiff's own three point grapple is untenable since, as Counsel himself observes, the Examiner was furnished a picture of it.

On pages 12 and 13 of their Brief, Defendants-Appellees argue that the concept of "lopsided or unbalanced grip," advanced by Plaintiff as being unobvious and a radical departure from accepted concepts of grapple structure at the time of the Lindberg invention, is an afterthought and contrary to the teachings of the Lindberg patent. Although the patent specification discusses the effect of the pads 55, 55' (Fig. 5 of the Lindberg patent), the invention is not limited to the use of such pads. As the Court noted at trial (Transcript of Proceedings, page 147), the pads 55, 55' are not in claim 1 of the patent and Plaintiff is not relying on them. From the time of the original filing of the Lindberg application, claims have been constantly asserted which do not recite the pads. As to Plaintiff's argument of nonobviousness, based on "unbalanced grip," this argument was presented to the Examiner during the prosecution of the Lindberg application (Plaintiff's Exhibit 2, pages 38 and 39) and can be considered as basis for the Examiner's allowance of the claims. This concept is not an "afterthought" or ex post facto inventing as in the *Graham* case relied upon by Defendants-Appellees. *Graham v. John Deere Co.*, 1966, 383 U.S. 1, 15 L.Ed. 2d 545. In the *Graham* case the "freeflex theory" was raised for the first time on appeal and hence the holding is not in point with the facts of this case.

## B. LINDBERG IS THE FIRST INVENTOR

Defendants-Appellees urge invalidity of the Lindberg patent on the basis that Lindberg was not the first inventor as required by 35 U. S. C. 102 (g) (Defendants-Appellees' Brief, pages 14-16).

The making of an invention requires both conception and reduction to practice, *Consolidated Vultee Aircraft Corp. v. Maurice A. Gorbell, Inc.*, 204 F.2d 946 (CCA-9 1953). Lindberg reduced the invention to practice in March 1958, (Defendants' Exhibit 143, pages 14-15). Jenkins can rely only on the filing date of his patent application, October 9, 1959, (Plaintiff's Exhibit 4) for reduction to practice since the Jenkins Models (Defendants' Exhibits 125, 126 and 127) do not constitute a reduction to practice. This was acknowledged at trial (Transcript of Proceedings, page 179, lines 11-16). Defendants-Appellees claim prior conception of the invention, however, in 1956. This is supported only by oral testimony and no physical evidence of the date of conception exists. Even if Jenkins was first to conceive he did not use reasonable diligence in reducing the invention to practice as required by 35 U. S. C. 102 (g), which must be *proved* in order to relate the date of invention back to the date of conception. *Hann v. Venetian Blind Corp., et al.*, 111 F.2d 455, (CA-9 1940). This burden of proof has not been met.

The period of required diligence for the party first to conceive and last to reduce to practice starts just prior to the time his rival conceives or enters the field and continues until the first conceiver reduces the invention to practice. "Interference Law and Practice," Revise and Caesar § 178, Period of Re-



quired Diligence, Vol. 1, page 549; see also *Christie v. Seybold*, 55 F 69 (CCA-6 1893). The party Jenkins allowed an approximate 18 month period to elapse between the Lindberg conception and entry into the field in March 1958, and the filing of the Jenkins' patent application on October 9, 1959. During this critical period Jenkins caused a non-infringing commercial grapple structure to be built and sold in December 1958, and filed a patent application on the non-infringing structure in March 1959 (Plaintiff's Exhibit 3).

Defendants-Appellees seek to excuse Jenkins' delay in filing his patent application on the basis of his alleged "impecunious state" and his "ignorance of patent matters." No evidence has been offered, however, to prove either of these contentions. The fact that Jenkins consulted a Patent Attorney, Mr. Anderson, in September 1958 (Defendants' Exhibit 145, page 42) and filed another patent application (Plaintiff's Exhibit 3) indicates that he was not "ignorant of patent matters."

Defendants-Appellees chose not to pursue a defense under 102 (g) and introduced no evidence to show diligence required by this section of the statute at the trial of the case. As a result the Trial Court entered no finding related to priority of inventorship and Plaintiff had no occasion to introduce evidence of Jenkins' financial state. Since Defendants-Appellees made no objection to the Trial Court's findings or to the basis for the Court's decision they are precluded from trying the issue for the first time on appeal and without opportunity for the submission of evidence.



## INFRINGEMENTS

### A. THE CLAIM LANGUAGE ENCOMPASSES THE ACCUSED GRAPPLE STRUCTURE

As pointed out in Plaintiff-Appellant's Opening Brief, pages 20-21, the term "pivot means pivotally interconnecting said jaws" was purposely used to broaden the language of the claim and this language was allowed by the Patent Office. Likewise, the term "interconnected to at least one of said jaws", as applied to the control cable, was purposely used to broaden the claim and was found allowable by the Examiner. Appellant is not relying on the doctrine of equivalents so as to go outside the language of the claim to find infringement nor can the doctrine of equivalents be used in reverse to limit claim 1 (Plaintiff-Appellant's Opening Brief, page 22).

The Ninth Circuit Case, *Nelson v. Batson*, 9 Cir., 1963, 322 F.2d 132, 135, relied on by Appellees is a "doctrine of equivalents" case wherein the Court was asked to go beyond the language of the claim to find infringement. The Court held that the precise language, calling for "an outboard motor" as an element in a combination, did not include an inboard motor fixed to the deck. The holding in the *Nelson* case thus has no application to the present case.

In *Lockwood v. Langendorf United Bakeries, Inc.*, 9 cir., 1963, 324 F.2d 82, 88, (Defendants-Appellees' Brief, page 20) it was held that infringement can be found if the claim reads on the accused device and the accused device performs the same function and achieves the same result in substantially the same way. This is exactly the situation in the present case.

Claim 1 of the Lindberg patent reads directly on the accused device (Plaintiff-Appellant's Opening Brief, pages 11-13). The function of the two grapples is identical, i.e. two grapple jaws are closed by a control cable to grip the logs and the jaws will open by gravity. The result of obtaining an unbalanced grip or squeeze for heel boom loading of logs is the same and the result is obtained in the same manner by pivoting two jaws relative to one another and applying force on both jaws by a single control cable.

## **B. ADMISSIONS MADE DURING INTERFERENCE PROCEEDING**

Plaintiff-Appellant's position as to the action taken by Defendants-Appellees during the interference between the parties is that they constitute admissions of infringement and are binding. The rule that admissions of infringement made during interference proceedings are binding on the parties, as set forth in *Albright-Nell Co. v. Autosteam Process Co.*, 7 Cir., 1934, 70 F.2d 959, cited by Appellees in their Brief, page 22, is based on the holding that the public has no interest, the issue being between the parties. The Court in that case distinguished between admissions of validity and admissions of infringement, noting that the former were not binding because of the duty owing to the public, citing *Haughey v. Lee*, 151 U.S. 282. In the case of *W. F. & John Barnes Co. v. International Harvester Co.*, D. C. N. D. Ill. E. D., 1943, 51 F. Supp. 254, although the court found it difficult to see the difference between public interest in the validity question and the infringement question as far as admissions are concerned, it was bound by the rule in the *Albright* case. In making its decision, however, it followed the exception to the rule ex-

pressed in *L. P. Larsen, Jr., Co. v. William Wrigley, Jr.*, 7 Cir., 253 F.914, 918 as follows:

[admissions are binding] . . . “unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true.”

There is no such demonstration in the present case wherein the claim reads squarely on the accused device and the breadth of the claim encompasses the accused structure.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A true copy of the foregoing Appellant's Reply Brief has been sent to J. Pierre Kolisch, Kolisch and Hartwell, 1004 Standard Plaza, Portland, Oregon 97204, as attorney for Appellees by United States mail this 20th day of October, 1967.

CARL G. DOWREY

*Counsel for Plaintiff-Appellant*

**CERTIFICATE OF COMPLIANCE**

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

CARL G. DOWREY

*Counsel for Plaintiff-Appellant*

No. 22,084 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

GEORGE W. PALMER,

Appellant,

vs.

HOWARD M. COMSTOCK, ET AL,

Appellee,

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APPELLANT'S BRIEF

Edward D. O'Brian  
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Attorney for Appellant

FILED

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U.S. COURT OF APPEALS  
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## STATEMENT OF PLEADINGS AND FACTS

The Appellant has brought this appeal under 28 USC 2253 from an order (R. 118-119) issued by the United States District Court for the Eastern District of California denying his petition for the writ of habeas corpus. Prior to petitioning for the writ, the Appellant presented a petition for the writ conveying the same issues to the Superior Court in Tuolumne County, California. By an order dated April 18, 1966, this state court denied this earlier petition (R. 16-18). Under Schiers v. People of the State of California (CA 9, 1964), 333 F.2d 173, upon the issuance of the state court order denying his earlier petition the Appellant had the right to seek the relief from the U. S. District Court.

The petition for the writ in the lower U. S. District Court was based upon 28 USC 2241. This code section provides that a U. S. District Court has the right to grant the writ of habeas corpus when a petitioner is held in custody in violation of the United States Constitution. Both of the previous petitions for this writ have been based upon the Appellant being held in custody by the State of California in violation of the due process requirement of the 14th Amendment of the United States Constitution





(R. 11, 18) because of denial of assistance of retained counsel at an alleged "hearing" at which the further imprisonment of Appellant was decreed.

Prior to this appeal being taken, the District Court judge who issued the order denying Appellant's petition for the writ issued a certificate of probable cause (R. 123-124) as required by 28 USC 2253 so that this appeal could go forward.

#### FACTUAL BACKGROUND

The issues with respect to this appeal do not directly concern the Appellant's original imprisonment. However, an understanding of this appeal and the issues raised by it is made easier by a review of the entire record.

The Appellant was originally sentenced on several matters by the Superior Court of Los Angeles County, California (R. 60-65). Thereafter in conformity with the California law, the terms of the Appellant's sentences were fixed by the Adult Authority of the California Department of Correction to run concurrently for a period of 3-1/2 years (R. 62). Under normal circumstances, the



Appellant could and did expect to be discharged from custody on November 9, 1964, the expiration date of this 3-1/2 year period.

At about the same time that the term of the Appellant's sentences were fixed, the Appellant was released on an approved parole plan (R. 62). However, a few minimum-type entries in it show that the Appellant, while on parole, was given certain civil rights (R. 71 and 72). Included in these rights which were restored to the Appellant was the right *"to enter into a partnership with his wife.....in their joint business.....and its subsidiaries, as requested."* From the wording, it would appear that at the time the Appellant was given this permission, there was already in existence a joint business and that the details of the Appellant's request were not placed in the record.

Shortly before the anticipated discharge date of the Appellant, there appears in the record (R. 70) a form document dated October 15, 1964, containing the printed words *"Parole cancelled--returned to prison ordered for the reasons set forth in the report of which this order is a part (term refixed at maximum....."*. The reasons for this form are apparent in a "Report to Adult Authority" bearing the legend of the Department of Corrections dated October 9, 1964 (R. 73-81).



This Report to the Adult Authority is of critical importance to this appeal. It specifies certain charges against the Appellant. The first and third of these charges are clearly criminal charges. The first pertains to the Appellant leaving California without permission. Such an act would be in violation of California Penal Code 3059. The third concerns the Appellant issuing checks with insufficient funds against a closed account. Such an act is clearly a penal matter under the California Penal Code 476(a). If guilty of either of these matters, the Appellant could be sentenced to an additional term in the State Penitentiary. The second of the charges specified in this October 9, 1964, Report pertains to the Appellant doing a number of items which he contends he had permission to do from the Adult Authority.

The October 9, 1964, Report is unique in several respects. On its face it is obviously based to a large extent on statements of the Appellant's then wife. The report even goes so far as to state that (R. 75) "*There is no doubt Mrs. Palmer was striking out at her husband to the parole agent. She revealed a great deal of hate towards Mr. Palmer.*" The report contains a great deal of material which can only be classified as inadmissible heresay.

The record shows (R. 73) that at the time of the October 9, 1964, Report to the Adult Authority the Appellant





was in the Los Angeles County Jail. It also shows that all of the circumstances regarding the Appellant's alleged violations of the terms of his parole evolved about the Los Angeles area. In other words, if the charges against the Appellant were to be accurately examined, records and witnesses would have to be located in the Los Angeles area.

The State of California instead chose to "examine" the charges against the Appellant at a considerable distance from Los Angeles--at San Quentin. On December 10, 1964, the State held an alleged "hearing" on the charges of parole violation against the Appellant. This date is well after the Appellant was due to be discharged from custody on the 3-1/2 year sentence.

One can question why the State bothered to hold an alleged "hearing" on the charges against the Appellant in view of the fact that as indicated above the Appellant's parole had been cancelled. The only way to rationalize this situation is to consider that California cancels a parole when the course of conduct by a parolee warrants investigation as to whether or not his parole should be terminated, and then, after the investigation is complete, holds a hearing in order to determine if in fact the parole should be terminated. This is in conformity with California Penal Code Section 3063, which states that a parole may be suspended or revoked for cause, but by omission indicates that a



parole may be cancelled without cause.

The record on the part of the State with respect to the alleged "hearing" on the charges against the Appellant makes it clear that this hearing was nothing more than a cruel hoax, the outcome of which was decided before it was held. The sole document introduced by the State as to this alleged "hearing" (R. 70) refers to the fact that a "hearing" was held and then states: *"Pld not guilty. Found guilty. Revoked. Denied....."* More details with respect to this "hearing" are found in Appellant's uncontroverted affidavit (R. 111-114) of record in the court below and in the decision of the State Court denying Appellant relief (R. 16-18).

At this alleged December 10, 1964 "hearing" the Appellant's Affidavit (R. 111-114) establishes that he requested an opportunity to have the assistance of the attorney who had been retained to assist him at this hearing but the California officials just plain ignored his request and proceeded without the Appellant having counsel. The State Court in the earlier proceeding held that this was a denial of the right to counsel (R. 17). The Affidavit sets forth that the Appellant was not aware of any transcript of the hearing being made, and he does not recall any documentary or testimonial evidence being presented against him.

According to the Affidavit, the hearing was held by the State officials with only the October 9, 1964, Report



being used against the Appellant and without anyone with first-hand knowledge of the facts in any way, even by affidavit on information and belief, indicating that anything in this document was true. This report itself was unverified heresay and was based on statements by a vengeful wife.

Against this background, at a far location from the Los Angeles area from where the Appellant could at least attempt to present a bona fide defense without the assistance of legal counsel retained to represent him, the Appellant was asked to plead guilty or not guilty to charges--including two criminal charges--and was found guilty on "evidence" which was not even on oath and which was admittedly based upon statements by a highly antagonistic wife who was striking out against her husband--the October 9, 1964, Report. He, at this alleged "hearing" did not have a reasonable opportunity to present the defenses which he believed to establish his innocence (R. 111-114).

#### STATEMENT OF CASE

By bringing the petition for the writ of habeas corpus in the District Court the Appellant sought to establish that his imprisonment resulting for the alleged "hearing" of December 10, 1964, is illegal. It is clearly illegal because at this alleged "hearing" the Appellant was denied





the fundamental protection of due process of law. He was denied the right to the assistance of the counsel who had been retained to represent him. Inasmuch as this has been found to be true by the California Court (R. 17), and has not been challenged by Appellees, there is no issue of fact on this point involved in this appeal.

Thus, this appeal seeks to establish the right of an accused parolee to have the assistance of attorney in presenting a defense at a parole violation hearing. A secondary type issue is the right to have such a hearing conducted at a location where the accused parolee can reasonably be expected to be able to present an effective defense, not at some location far from the area where the alleged parole violations occurred. Another secondary type issue is the right of a parolee at such a hearing to be immune from "conviction" solely on the basis of an unverified hearsay document.

These issues or points have all been noted in record before the District Court. The Memorandum and Order denying Appellant's petition (R. 111, 112) specifically indicated that the lower court *"was of the view that a substantial constitutional question was raised"* by question of the rights of an accused parolee to have the assistance of an attorney at a parole violation hearing. The secondary



issues are presented in the record below in Appellant's Affidavit (R. 111, 112) and elsewhere.

### SPECIFICATION OF ERROR

The decision of the District Court (R. 118, 119) held on the basis of the recent decision by this Court in Williams v. Dunbar et al (No. 21, 395, April 26, 1967) that a parolee at a parole violation hearing in effect does not possess the "rights" indicated in the preceding under the due process clause of the Fourteenth Amendment of the United States Constitution. This is clearly contrary to the reasoning of the Williams case, and was an erroneous decision.

The Williams case involved proceedings under the Civil Rights Act, 42 USC 1983, 1985. In it the Appellant was seeking damages for defamation, false imprisonment and fraud on the ground that he had been damaged because he was not accorded a conventional court hearing on parole violation charges, carried out with the usual witnesses, assistance of counsel and other conventional procedural rights possessed by one accused of a crime. In deciding the Williams case, the court ruled against the Appellant on the ground that if the Appellant obtained the relief requested it would in effect make the entire concept of



parole impossible. The present Appellant cannot help but agree with this contention.

In this proceeding the Appellant is not seeking a court trial for the crimes he was charged with and found guilty of by the alleged "hearing" held December 10, 1964. Neither is the Appellant seeking a full-fledged court trial on the noncriminal charge brought against him at this hearing. Nor is the present Appellant seeking damages. The purpose of the Appellant's petition for the writ of habeas corpus in the lower court proceeding was not to determine whether or not the charges against him were true or false.

In this case the Appellant is seeking his release for the basic reason that the alleged "hearing" held December 10, 1964, was nothing more or less than a cruel hoax carried out in the basic violation of the fundamental concepts of due process.

The Appellant believes that he has defenses to all of the charges against him (R. 111-114). He was entitled to a fair hearing with the assistance of counsel at a location where he could procure the attendance of witnesses to determine whether or not his defenses were valid. The Appellant was also entitled to his freedom unless "convicted" on more reliable evidence than an unverified





report. This case is not a demand for a court hearing on the charges against Appellant; this appeal is a demand for redress of imprisonment resulting from a star chamber type of proceeding.

It is considered that Appellant's attack on the alleged December 10, 1964, "hearing" is particularly within the realm of reason and fairness since at this "hearing" the State of California charged the Appellant with crimes and various parole violation charges and found him guilty of such things and is now incarcerating him in prison--all without even allowing him the right to have an attorney assist with presenting a defense.

#### CALIFORNIA PAROLE PROCEDURE

This course of conduct by the Adult Authority of the California Department of Corrections presents a curious dichotomy in procedure. California, by the charges (R. 73), accused the Appellant of two different criminal offenses. It did not follow the customary procedure of bringing the matter of these criminal offenses before a trial court where the Appellant could have all the benefits of established procedures to present his defenses. Instead the State authorities deprived the Appellant of witnesses and even counsel retained by Appellant by holding an alleged



"hearing" at a far distance from the area of the alleged criminal offenses and parole violation and found the Appellant guilty of these crimes. It did this presumably under its broad authority over a parolee.

Thus, California has followed a rather unique procedure which if allowed to go uncorrected can lead to some surprising results. Under this procedure if this State considers a parolee guilty of a crime, it can save itself the trouble of having to accord the parolee a trial by merely terminating the parole. This has the same effect of causing imprisonment as finding the parolee guilty of the crime in a Court of law and alleviates the possibility that the parolee might have a defense which could be effectively presented with the aid of counsel through the use of witnesses. By this procedure, California can save itself the difficulty of having to listen to and weigh the statements of witnesses, the difficulty of judging whether or not an unverified report is or is not accurate and avoid being subjected to perhaps convincing arguments by counsel.

California cannot only avoid trials by the procedure followed here; it can do several things to avoid the trouble of a detailed hearing. One of these things is to hold the hearing with respect to charges against a parolee so far removed from the witnesses who might be useful in determining the accuracy of these charges that there is no



reasonable chance of the witnesses being present. The State can also accomplish these objectives by not bothering to even have the charges against a parolee verified on even so little a basis as information and belief. Above all, the State can simplify its authority over parolees by not giving them the right to have the assistance of counsel in presenting whatever defenses they may have at an alleged hearing with respect to any charges the State chooses to bring against a parolee.

In procedures leading to this appeal, the State has done all of these things. The alleged hearing on Appellant's parole was held far distant from the scenes of the Appellant's alleged crimes and violations and far distant from the materials and witnesses which might provide a defense to all of the charges against him. The alleged "hearing" was held without the Appellant having the assistance of his retained counsel and yet the hearing clearly determined whether or not the Appellant had a right to return to normal society.

Under these circumstances, the alleged "hearing" can only be described as a cruel hoax reminiscent of the notorious star chamber proceedings. There can be no question but that the State has the right to investigate the matters charged against the Appellant, and presumably to hold the Appellant in custody during such an investigation. Presumably





the cancellation of Appellant's parole was to provide time for such an investigation. If this cancellation were not for this purpose, the alleged "hearing" would have been nothing more or less than a useless procedure.

Certainly the State of California, by asking the Appellant to plead guilty or not guilty to the charges against him at the "hearing", intended this hearing procedure to give the appearance of providing some sort of a reasonable safeguard to prevent a parole being determined on a mere executive whim. Otherwise, why was the hearing held? Under the California law a parole can be revoked only for cause (California Penal Code 3063). And yet, the State of California by its course of conduct turned this "hearing" into a mockery of justice by not according even reasonable safeguards to make sure that the Appellant's right to return to society was determined on a fair basis.

#### ARGUMENT RE DUE PROCESS

The Fourteenth Amendment to the United States Constitution clearly provides that no person shall be deprived of his right to live in society without "due process" of the law. It has often been held that the right to counsel comes within the scope of what is required by due



process. In the classic case Powell v. Alabama, 1932, 287 US 45, the Supreme Court determined that a fair hearing required the accused to be represented by counsel stating:

*"What then does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right.*

*"If in any case, Civil or Criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by him and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the Constitutional sense."*

More recent decisions such as Johnson v. Zerbst, 1938, 304 US 468; Gideon v. Wainwright, 1963, 372 US 335; Escobedo v. Illinois, 1962, 378 US 478; and Douglas v. California, 1962, 272 US 353, have extended the right to counsel.

The constantly expanding scope of due process is indicated by the court's decision in Jones v. Rivers, 1964, 4th Cir., 338 F.2d 8-64, where the court stated:

*"We are not unmindful of the fact, a fact urged as compelling here, that the spread of the*



*due process umbrella is being rapidly enlarged to provide counsel protection for individual rights which, only a few short years ago, had little or no recognition."*

The concurring opinion by the chief judge in this case is particularly significant with respect to the fact that the Appellant was clearly denied due process since it states:

*".....where the issue is a factual one, i.e., whether the parolee has violated the conditions of his parole, the parolee..... requires the assistance of counsel. Such assistance is needed to insure that, in the determination of the factual issues before the Parole Board, the accused parolee is afforded all of the procedural safeguards to which he is entitled."*

From this quotation it can hardly be argued that a parolee is in such a special status that he is not entitled to the assistance of counsel at a hearing where his liberty is at stake. The right of a parolee to counsel at a hearing is established in other areas by cases such as Hyser v. Reed (CA, DC Cir., 1963) 318 F.2d 225 and Glen v. Reed (CA, DC Cir., 1961) 289 F.2d 462. The latter case even points out that it is conceded in other jurisdictions that a





parolee is entitled to counsel at a hearing regarding his liberty by the following quotation:

*"The government rightly concedes the hearing and revocation were invlaid because appellant neither had nor was offered counsel. His subsequent imprisonment is therefore illegal.*

*"Lack of counsel at a revocation hearing is not made good by an offer of counsel 17 months later. The error of 1958 cannot be corrected, because the illegal imprisonment that resulted from it cannot be undone."*

The facts indicated in the preceding--which are uncontroverted by the State--make it clear that the Appellant was denied counsel, even though several of the charges against him which he had to plead to were criminal offenses. Such denial of counsel is clearly a denial of due process of the law and therefore the petitioner should be released from custody.

#### ARGUMENT RE WILLIAMS V. DUNBAR ET AL

The logic of the District Court decision (R. 118-119) denying Appellant the writ of habeas corpus on the basis of Williams v. Dunbar et al, supra, is impossible to understand in view of the prior decisions on the same point



cited in the preceding and is clearly erroneous. It is interesting to note that in the Williams case, supra, the court cited as authority for its decision the Jones v. Rivers and Hyser v. Reed decisions, supra, which the Appellant relied upon in his appeal. Both of these latter decisions clearly indicate that if a parolee at a parole violation hearing has counsel available to him he is entitled to the assistance of such counsel in order to present his defenses in the most favorable manner. At the time of the alleged December 10, 1964, "hearing" the Appellant had retained counsel but was denied the assistance of such counsel at the "hearing" (R. 17, 111).

In the Williams decision, supra, the Appellant apparently based his claim for damages for defamation, false imprisonment and fraud under the Civil Rights Act, 42 USC 1983 and 1985 on a mere cursory allegation of arbitrary and capricious action. Such action involved a set of facts tending to indicate that the Complainant in Williams was not cooperating with the parole officer. This Court specifically held that an issue such as this is "*for the parole authorities, not for the courts*".

The present Appellant does not argue with this conclusion. The benefits of the parole system are too well founded and too well recognized for this system to be literally hamstrung by judicial interpretation of due process



requiring that each and every question of parole violation be heard by the courts. But, however, there must be a limitation placed on any such parole system by the due process requirement of the Fourteenth Amendment to insure that such a system is carried out with the basic elements of fairness.

In Powell v. Alabama, supra, the Supreme Court held that the arbitrary refusal to hear a party by counsel *"in any case"* would amount to a denial *"of due process in a constitutional sense"*. Jones v. Rivers, supra, in the concurring opinion indicated that the assistance of counsel by a parolee at a parole violation hearing *"is needed to insure that, in the determination of the factual issues before the parole board, the accused parolee is afforded all of the procedural safeguards to which he is entitled"*. Glenn v. Reed, supra, recited that the government even conceded that imprisonment resulting from a hearing in which a parolee did not have counsel was invalid and illegal. On the basis of these authorities relied upon in the Williams decision by this court the Appellant here is entitled to his release.

In the Williams case this court held that the Complainant had not presented a Federal question. From this it is believed that the Complainant in Williams did not directly seek to attack the parole violation hearing accorded him. In other words, Williams accepted the hearing and





violation hearing accorded him and then at a later date sought damages because of an allegation that his civil rights had been violated. This is far different from what is occurring by the Appellant's attack on his imprisonment.

The Appellant, in this proceeding, directly attacks the alleged "hearing" which resulted in his imprisonment on the grounds that this "hearing" was not a hearing at all as required by due process of the Fourteenth Amendment, but a type of star chamber proceeding at which he was asked to plead by the State to various charges--including charges of criminal offenses--without the right to assistance of counsel and was found guilty of the charges against him without the assistance of counsel in order to aid in the presentation of the defenses he believes he has to the charges. It should be borne in mind that the Appellant believes the location of the hearing, and the lack of any evidence of any type under oath against him also show a lack of even a tendency or desire by the State of California to follow the basic concepts of fairness required by due process.

#### CONCLUSION

For these reasons, the Appellant respectfully submits that he is entitled to his release. A number of years have gone by since the alleged December 10, 1964, "hearing".

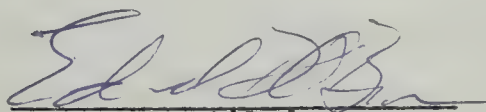


As pointed out in Glenn v. Reed, supra, the denial of due process long ago in the past cannot be rectified because the Appellant's legal imprisonment cannot be undone. If the Appellant were to be offered another hearing, such a hearing would in effect be a nullity and could only result in his further imprisonment. In December of 1964, the memories of witnesses were fresh. Now they are undoubtedly dull. In December of 1964, records could have been presumably easily located. Now they are undoubtedly scattered.

More important, in December of 1964 the Appellant had retained counsel. He is now indigent; he cannot afford counsel. Hyser v. Reed, supra, makes it clear that due process does not require than an indigent parolee be furnished counsel at a parole violation hearing. In short, it would be impossible for the Appellant, under the circumstances, at this time to have a fair hearing.

In the interests of justice and because of the denial of due process, the Appellant must be released through a favorable decision by the Court.

Respectfully submitted,

  
Edward D. O'Brian  
Attorney for Appellant

Anaheim, California  
November 14, 1967



CERTIFICATE

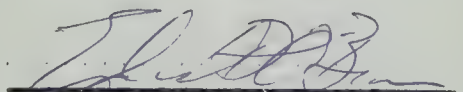
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Edward D. O'Brian  
Attorney for Appellant

PROOF OF SERVICE

EDWARD D. O'BRIAN, Counsel for Appellant, GEORGE W. PALMER, in the above entitled matter hereby certifies that three (3) copies of the foregoing Brief were placed in the United States mail, with postage fully prepaid, addressed to DORIS H. MAIER, Assistant Attorney General, 500 Wells Fargo Bank Building, Fifth Street and Capitol Mall, Sacramento, California, on this 17<sup>th</sup> day of Nov., 1967



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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GEORGE W. PALMER,

Appellant,

vs.

HOWARD M. COMSTOCK, et al,

Appellees.

No. 22,084

APPELLEES' BRIEF

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GEORGE W. PALMER,

Appellant,

vs.

HOWARD M. COMSTOCK, et al,

Appellees.

No. 22,084

APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

Appellant is a California state prisoner who filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California pursuant to 28 U.S.C. Sections 2241 and 2242. He seeks his release from state prison upon the ground that his parole was improperly revoked by the California Adult Authority. Following an order to show cause, Appellee filed its return and Appellant filed his traverse thereto. By memorandum and order dated May 18, 1967, the District Court dismissed the petition. The District Court granted a certificate of probable cause by order dated June 21, 1967, and jurisdiction for this appeal exists under 28 U.S.C. Section 2253.

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## STATEMENT OF THE CASE

Appellant was committed to state prison on April 25, 1961, by judgments of the Los Angeles Superior Court following convictions on five charges of issuing worthless checks without sufficient funds, the sentences to run concurrently (Record, pp. 60-65). Appellant has not attacked the validity of these judgments.

On March 8, 1962, the California Adult Authority fixed the term of Appellant's concurrent sentences at 3-1/2 years (Record, p. 62). On April 15, 1962, Appellant was released on parole.

On October 9, 1964, Appellant's parole officer prepared a parole violation report specifying violations of the conditions of his parole as follows:

"(1) George Wm Palmer did violate Condition 2 of the Conditions of Parole by leaving the State of California without the knowledge or permission of his parole agent.

"(2) George Wm Palmer did violate Condition 12 of the Conditions of Parole by:

(a) By signing a note with the Union Bank at its Beverly Hills Office in the amount of \$2500.00 on 4-18-63.

(b) By signing a note with the Continental Bank at its Sunset





Office in the amount of \$3500.00  
on 5-15-64.

(c) By being a co-signer with Mavis  
Palmer, president of Imagineers, Inc.,  
with the Continental Bank at its  
Sunset Office in the amount of  
\$6500.00 on 7-20-64.

(d) By signing a continuing guarantee  
with Continental Bank in the amount  
of \$10,000.00 in the name of  
Imagineers, Inc., and/or George  
Palmer on 5-15-64.

(e) By being a co-signer with Mavis  
Palmer, president of Imagineers, Inc.,  
and also as individuals on a note to  
Mr. Adam Hettich in the amount of  
\$10,000.00 on 3-3-64.

"(3) George Wm Palmer did violate Condition 11  
of the Conditions of Parole by committing  
the offense of issuing checks with non-  
sufficient funds and against a closed  
account."

(Record, pp. 73-81.)

On October 15, 1964, Appellant's parole was  
cancelled and petitioner was ordered returned to prison  
for the reasons set forth in the parole violation report



which was incorporated into the order of cancellation and the term was refixed at the maximum in accordance with Resolution 171 adopted March 6, 1951 (Record, p. 70).

On October 20, 1964, Appellant was returned to the California State Prison at Chino and on November 2, 1964, he was transferred to the California State Prison at San Quentin. On December 10, 1964, the California Adult Authority held a hearing at San Quentin on the parole violation charges. Appellant pleaded not guilty to the charges. He was found guilty and his parole was revoked (Record, p. 70).

On October 29, 1965, Appellant was transferred to the Sierra Conservation Center at Jamestown. On March 29, 1966, Appellant filed a petition for a Writ of Habeas Corpus in the Tuolumne County Superior Court including as grounds that he was denied due process:

"(1) because he was denied counsel at  
an alleged 'hearing' on December 10,  
1964 before the Adult Authority,

"(2) because of the place of this hearing and

"(3) because at the hearing he was  
charged with at least one crime  
and was not able to be represented  
by counsel and/or subpoena witnesses in his behalf."



On April 15, 1966, a hearing was held upon an order to show cause at which Appellant was represented by counsel. On April 18, 1966, the Tuolumne County Superior Court made its order denying the petition for writ of habeas corpus after finding that Appellant was not represented by counsel and had been denied counsel at his parole revocation hearing on December 10, 1964, because Appellant had no right to notice or a hearing on revocation of his parole (Record, p. 17).

On November 7, 1966, Appellant filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California alleging the same grounds as his habeas petition in the Tuolumne County Superior Court. In its Order to Show Cause the District Court stated:

"Petitioner alleges that at the time of his hearing before the California Adult Authority, he was denied, over objection, representation by counsel. Petitioner further alleges that he had made arrangements for representation and that an attorney was willing and able to appear in his behalf. Those allegations would appear to present substantial issues cognizable in the federal courts (See: Jones v. Rivers, 338 F.2d 862)."





Return was made to the order and Appellant filed his traverse thereto. The District Court dismissed the petition by Memorandum and Order dated May 18, 1967, in which the court stated:

"Petitioner's sole claim for relief is that the failure of the California Adult Authority to allow his attorney to be present at petitioner's parole revocation proceeding was a denial of rights secured to him under the Fourteenth Amendment to the Constitution of the United States. This Court was of the view that a substantial constitutional question was raised by that allegation. The United States Court of Appeals for the Ninth Circuit, however, has taken an opposite view and that puts the issue to rest so far as this Court is concerned. In Williams v. Dunbar (No. 21, 395, decided April 26, 1967), the Court of Appeals held that a parolee who disputed an alleged violation of the conditions of his parole was not entitled to a court hearing, representation by counsel, confrontation of witnesses and process to obtain witnesses in his behalf. Since



the Williams case arose under the Civil Rights Acts, Title 42 U.S.C. §§ 1983, 1985, the Federal Rules of Civil Procedure applied as did federal civil practice law. Accordingly, the appellant in Williams would have been entitled to relief on any one of the several elements of the claim he made, if that element rose to constitutional stature. The Court having denied all relief in Williams, this Court must assume that it is the law of the Ninth Circuit that denial of counsel at the time of revocation of parole before a state administrative agency does not present a federal constitutional question."

Appellant appeals from the foregoing order of dismissal.

#### APPELLANT'S CONTENTIONS

Appellant contends: (AOB p. 8)

1. That a state prisoner on parole has a federal constitutional right to the assistance of counsel at a parole violation hearing.

2. That a state prisoner on parole has a federal constitutional right to a parole violation hearing at a location reasonably near the place of the alleged parole violations.

3. That revocation of a state prisoner's



parole cannot be based solely upon the unsworn written report of the parole officer.

#### ARGUMENT

I. A CALIFORNIA PRISONER ON PAROLE  
HAS NO CONSTITUTIONAL OR STATUTORY  
RIGHT TO NOTICE OR HEARING ON  
REVOCATION OF HIS PAROLE.

The California Adult Authority is authorized by statute to revoke the parole of any state prisoner for cause without notice. (Penal Code § 3060 and § 3063.) Prisoners on parole shall remain under the legal custody of the Department of Corrections and shall be subject at any time to be taken back within the enclosure of the prison. (Penal Code § 3056.) The California Supreme Court has held that the Penal Code provisions for revoking parole do not violate due process because of the absence of a requirement for notice or hearing. People v. Dorado (1965) 62 Cal.2d 338, 359, 398 P.2d 361.

The United States Supreme Court has not passed on the question whether the federal constitution requires notice or hearing on revocation of parole. [See Richardson v. Markley (1965, Seventh Circuit) 339 F.2d 967, 969.]

In Williams v. Dunbar (1967, Ninth Circuit) 377 F.2d 505, a California state prisoner brought an action under the Civil Rights Act claiming that in the





procedures followed by the California Adult Authority in revoking his parole, constitutional due process would have required that he be afforded a court hearing, with the rights to be represented by counsel, to confront and cross-examine witnesses and to have process to summon witnesses to support his denial of violation of parole. This Court noted that such contention had been litigated many times and always rejected and the Court speaking through Judge Madden rejected the contention with the following observation:

"If the appellant's contentions were valid, the use by the states and the federal government of the beneficent practice of releasing prisoners from the confines of the prison to the custody and supervision of parole officers would be impracticable and would have to be abandoned. The release from the confines of the prison would become substantially equivalent to the discharge of the prisoner from his sentence, and if, as in the instant case, the parolee denied either the fact of the violation or the legal sufficiency of the act alleged to be a violation of his parole, the prison authorities would be required, in a hearing before a judge, with all the



concomitants of a non-jury criminal trial, to justify their resumption of in-prison custody of their prisoner."

In Richardson v. Markley (1965, Seventh Circuit) 339 F.2d 967, a federal prisoner sought habeas relief alleging that his rights were violated when he was returned to prison without a "preliminary interview" for violation of parole at or near the alleged violation of parole. The court held (at p. 970) that petitioner's constitutional rights were not violated by the failure of the Parole Board to hold such a hearing after petitioner had been arrested for parole violation.

In U.S. v. Ragen (1949, Seventh Circuit) 177 F.2d 303, 304, a state prisoner's parole was revoked and he claimed that the parole revocation hearing violated his constitutional rights to due process of law. The court held that the parole revocation hearing was purely statutory and "the right to such hearing is not constitutional."

In Jones v. Rivers (1964, Fourth Circuit) 338 F.2d 862, a federal parolee sought release on habeas corpus on the ground that he was denied the right to counsel at his parole revocation hearing. The court stated that "the only question presented on appeal is whether due process requires that an indigent parolee be provided with appointed counsel at parole



revocation proceedings before the District of Columbia Board of Parole." (Page 863.) The court held that due process was not involved stating at page 874:

"Freedom, on parole from confinement in a penal institution prior to serving all of an imposed sentence, is a matter of legislative grace -- it is neither a constitutionally guaranteed nor a God-given right."

In Hyser v. Reed (1963, District of Columbia Circuit) 318 F.2d 225, 237, a federal prisoner urged that the various elements of the Sixth Amendment relating to venue, notice of charge, confrontation, compulsory process for witnesses and right to counsel are included in the due process restrictions of the Fifth Amendment as they apply to actions of the Parole Board. The court rejected this claim and held (p. 238) that due process did not require appointment of counsel for indigent parolees, nor require the Board to allow cross-examination of its sources of information in parole revocation proceedings.

II. DUE PROCESS DOES NOT REQUIRE  
RIGHT TO COUNSEL, CONFRONTATION,  
SWORN EVIDENCE OR PROXIMITY IN  
PAROLE REVOCATION HEARINGS.

In some jurisdictions a parolee is given the right to a hearing on parole revocation by statute.





(E.g., Section 24-206 District of Columbia Code; 18 U.S.C. § 4207; Illinois Parole Act cited in U.S. v. Ragen, supra.) In such jurisdictions the hearing contemplated is not a criminal trial with the usual rights to counsel, confrontation, process, etc., normally associated with adversary proceedings.

In Lopez v. Madigan (1959, D.C., N.D. Calif.) 174 F.Supp. 919, cited with approval by this Court in Williams v. Dunbar, supra, a federal prisoner sought release on habeas corpus claiming that he had been denied assistance of counsel in his parole revocation hearing. The court held: (P. 921)

"Hearings before the Board [pursuant to 18 U.S.C. § 4207] are not adversary proceedings. They are informal, unsworn, and not bound by the rules of evidence. [Citation.] Their purpose is as much to form a part of the rehabilitation process as to provide a check on the administrative decision, already tentatively made, that the conditions of release were violated."

In Gonzales v. Patterson (1966, Tenth Circuit) 370 F.2d 94, a state prisoner sought habeas corpus relief alleging he had been denied the rights of confrontation and the assistance of counsel at his parole revocation hearing. The trial court's summary



denial of relief was affirmed.

In Washington v. Hagan (1960, Third Circuit) 287 F.2d 332, a federal prisoner claimed that he was denied the right to counsel at his parole revocation hearing. The prosecution admitted that he was not informed he was entitled to counsel and that if he had asked for counsel, he would not have been allowed to be represented at the hearing by a lawyer. The court noted (p. 334) that the federal practice for more than fifty years has been to allow a hearing but not representation by counsel. The denial of habeas corpus relief was affirmed.

### III. REVOCATION OF APPELLANT'S PAROLE WAS NOT ARBITRARY OR CAPRICIOUS.

The only constitutional question which arises upon a revocation of parole is whether the action taken was arbitrary or capricious. Revocation of parole must be for "cause." Penal Code § 3063; Hyser v. Reed, 318 F.2d 225, 242. Such cause would usually be a violation of the conditions of the parole though it is not necessarily limited to such violation. There must be some substantial evidence of such cause but the reliability of that evidence is for the Adult Authority, not the courts. Lopez v. Madigan, 174 F.Supp. 919, 922; Williams v. Dunbar, 377 F.2d 505, 506. And this Court has made it clear that a mere conclusory allegation



that the decision to revoke parole was arbitrary and capricious does not raise a constitutional question. Williams v. Dunbar, 337 F.2d 505, 506.

In this case the Adult Authority acted upon its parole officer's written report specifying seven separate violations of Appellant's parole, together with the evidence supporting those violations. The report also evaluates Appellant's adjustment on parole and concludes with the recommendation that parole be revoked. (Record, pp. 73-81.) That report provided the "cause" and the evidence which justified the action of the Adult Authority in this case. In view of that report it cannot be said that revocation of Appellant's parole was arbitrary or capricious.

#### IV. PROBATION CASES COMPARED.

While the United States Supreme Court has not rendered an opinion upon the constitutional requirements of revoking parole, it has considered probation revocation procedures in three cases.

In Burns v. U.S. (1932) 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266, this Court affirmed an order revoking probation of a federal prisoner and the Supreme Court granted certiorari. The prisoner claimed he was entitled to previous notice of specific charges of violation and a hearing on those charges. The court, speaking through Mr. Chief Justice Hughes said:





(pp. 222-223)

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. [Citation.] It takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result.' [Citation.] While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

In Escoe v. Zerbst (1935) 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566, a federal prisoner sought release on habeas corpus on the ground that his probation had been revoked without any hearing before the court. The court, speaking through Mr. Justice Cardozo reversed the order dismissing the habeas petition because the



federal statute on probation required that the probationer "shall forthwith be taken before the court" and this mandate was disobeyed. The opinion added: (pp. 492-493.)

"In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. Burns v. United States, 287 U.S. 216 [53 S.Ct. 154, 77 L.Ed. 266]. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided in the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. . . ."

In Mempa v. Rhay and Walking v. Rhay (1967) 386 U.S. 907, 87 S.Ct. 852, 17 L.Ed.2d 781, petitioners



had been convicted in the state courts in Washington and were placed on probation with sentencing deferred. Later they were returned to court for violating probation. Mempa was not represented by counsel, was not asked if he wanted counsel and no inquiry was made about the appointed counsel who previously represented him. Walking was granted a week to retain counsel, but the court proceeded when his retained counsel did not appear. Appointed counsel was not offered and would not have been granted if requested. The court revoked probation of both on the hearsay testimony of the probation officer that petitioners had committed certain offenses while on probation and sentenced them to state prison. The Washington Supreme Court denied habeas corpus and the United States Supreme Court granted certiorari. The court, speaking through Mr. Justice Marshall, reversed the judgments denying habeas relief holding "that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing." The opinion reasons that the right to appointed counsel made applicable to state felony cases by Gideon v. Wainwright (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, applies not only to representation during trial on the merits but also to "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Citing Townsend v. Burke (1948) 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690,





the opinion states that the right to appointed counsel applies at sentencing. The opinion relies heavily on the fact that certain legal rights may be lost if not exercised at this particular stage of the case under Washington law, including the right to appeal.

It is submitted that this case is limited in its application to require counsel at the time of sentence with or without a contemporaneous revocation of a prior probation and would not apply to a case of revocation of probation granted after sentence had been pronounced and its execution suspended as is authorized by California law. This is indicated by the lack of any reference to Burns v. U.S., supra, and Escoe v. Zerbst, supra. If the court meant to overrule Burns and Escoe, surely there would be some mention of these cases in the opinion.

Even if Mempa v. Rhay, supra, establishes a right to counsel in all probation revocation proceedings, there remains an important distinction between parole revocation and probation revocation. Arketa v. Wilson (1967, Ninth Circuit) 373 F.2d 582. The probationer is not serving his sentence while on probation but the prisoner is serving his sentence while on parole. Hutchison v. Patterson (1967, D.C. Colo.) 267 F.Supp. 433. The questions to be decided at a probation violation hearing may well affect the adjudication of



guilt as was pointed out in Mempa v. Rhay, supra. But the question to be decided on parole revocation is one of determining what course is best suited to rehabilitation of the offender. As stated in Washington v. Hagan, 287 F.2d 332 at 334:

"The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole."

V. APPELLANT HAS FAILED TO EXHAUST  
AND HAS DELIBERATELY BYPASSED  
AVAILABLE STATE REMEDIES.

28 U.S.C. 2254 provides in part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless



it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(Emphasis added.)

The question of the validity of parole revocation procedures may be raised by petition for habeas corpus in the California state courts. In re McLain (1960) 55 Cal.2d 78, 85, 357 P.2d 1080. Original jurisdiction in habeas corpus proceedings is vested in "the Supreme Court, courts of appeal, superior courts, and their judges." California Constitution, art. VI, § 10. Appellant filed a habeas corpus petition in the Tuolumne County Superior Court but has not sought habeas relief either in the California District Court





of Appeal or in the California Supreme Court (AOB 1). In Morehead v. State of California (1964, Ninth Circuit) 339 F.2d 170, this Court held that until a state prisoner's remedies by habeas petition to the California District Court of Appeal and Supreme Court were exhausted, the District Court had no power to grant his petition for habeas corpus, citing 28 U.S.C. section 2254 and Fay v. Noia (1963) 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

#### CONCLUSION

Appellant had no constitutional or statutory right to a hearing on revocation of parole. Due process does not require the right to assistance of counsel or confrontation of witnesses in parole revocation hearings. The revocation of Appellant's parole was not arbitrary or capricious. No federal question

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is presented, nor has Appellant exhausted available state remedies. The order dismissing the petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

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Attorney General

DORIS H. MAIER  
Assistant Attorney General

JACK R. WINKLER  
Deputy Attorney General

Attorneys for Appellees



CERTIFICATION OF COUNSEL

I certify that in connection with the presentation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated: January 17, 1968.

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JACK R. WINKLER  
Deputy Attorney General





NO. 22,084

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GEORGE W. PALMER,

Appellant,

vs.

HOWARD M. COMSTOCK, ET AL

Appellee,

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**FILED**

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APPELLANT'S REPLY BRIEF

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## INTRODUCTORY STATEMENT

The appellee's brief seems to gloss over so many points so as to lose sight of the principal issues in the case. These issues all evolve about the current standards for a fair hearing as required by due process clause of the 14th Amendment to the Federal Constitution. No effort is made in this reply brief to cover appellee's arguments covered by the appellant's principal brief.

## UNDER MEMPA v. RHAY APPELLANT MUST BE RELEASED

Apparently the appellee would have this Court believe that a State accusation of a criminal offense is not always a State accusation of a criminal offense, particularly when such an accusation is made against an alleged parole violator at a parole violation hearing. In fact an accusation of a criminal offense by a State is always such an accusation regardless of how it is labeled or what form it may take.

By now it is well established that one accused of a crime is entitled to the assistance of counsel whenever the accusation is made. The most recent pronouncement on this point is in the combined cases MEMPA v. RHAY and WALKLING v. WASHINGTON STATE BOARD, 1967, 19 Led 2d 336, decided during



the pendency of this proceeding. These cases involve the revocation of probation. While pointing out the many ways that an attorney was necessary at probation violation hearings the court said (page 340);

*"...That appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."*

In making these statements the court cited in the opinions such well-known cases as TOWSEND v. BURKE, 1946, 334 US 736, 92 Led 1690; MOORE v. MICHIGAN, 1957, 355 US 155, 2 Led 2d 167; HAMILTON v. ALABAMA, 1961, 368 US 52, 7 Led 2d 114; and GIDDEON v. WAINRIGHT 1963, 372 US 335, 9 Led 2d 799. It could also have referred to JOHNSON v. ZERBST, 1938, 304 US 416; ESCOBEDO v. ILLINOIS, 1962, 378 US 478 and DOUGLAS v. CALIFORNIA, 1962, 372 US 353 which have extended the right to counsel under due process of the Federal Constitution.

The application of the rule of MEMPA v. RHAY, supra, to the present fact situation is simple. The State of California was the principal actor, acting through its Adult Authority and its parole officials. Through one of these officials the State drew up charges against appellant of specific "violations" as reproduced on pages 2 and 3 of the appellee's brief. The first of these "violations" charged is



a penal offense or crime under California penal code 3059; the third involves bad checks, a clear-cut penal or criminal matter under California penal code 476(a).

The appellee's brief on page 4 admits then that California, through its Adult Authority, held a "hearing" on these specific criminal offenses and other charges at the California San Quentin prison, and that at this hearing the appellant after pleading not guilty was found guilty of the charges. Thus, the appellant was asked to plead, and did in fact please not guilty of two criminal charges and was found guilty on these charges by the State.

What makes this matter particularly onerous is the fact that the appellant at that time of the hearing had counsel available to him but was denied the assistance of this counsel. This matter is also onerous because the place of hearing was so far removed from the area where the alleged violations occurred that he did not have a reasonable chance of presenting even a bona fide defense. Without such a defense he was "found guilty" and his parole was revoked solely on the basis of a hearsay document containing the alleged "violations".

Such an alleged "hearing" as transpired in the appellant's case was obviously a criminal proceeding. It is not seen how this appellee can label it anything else. The





State alleged criminal acts and found appellant guilty of these acts without even allowing him the assistance of counsel. The appellee would have this court believe that a parole violation is not in fact a criminal proceeding. This is patent nonsense.

In a criminal proceeding a person is charged with committing a crime and if found guilty is punished as by imprisonment. In the appellant's case, the appellant was accused and a "hearing" was held as to whether or not he was guilty. Obviously the purpose of this "hearing" was to revoke the appellant's parole if he was guilty of any wrong-doing so as to cause further imprisonment. Imprisonment is imprisonment regardless of how it comes about. Here it is a part of the criminal process carried out by the State of California, regardless of how it is labeled.

In MEMPA v. RHAY, supra, it was held in a probation matter that an accused was entitled to appointed counsel because of the 14th Amendment to the Federal Constitution. Such a probation matter is different from a parole violation matter only as to degree; the two certainly do not differ in kind. At the parole violation hearing in this case the appellant was found guilty of crimes. This may relate to rehabilitation but it still is binding by the State on criminal charges.



UNDER APPELLEES' CASES APPELLANT MUST BE RELEASED

This court in ANKETA v. WILSON (CA9, 1967) 373 F.2d 582 (cited by the appellee) stated that there was little real difference between parole and probation as follows (p. 584):

*"...We can see little substantive difference between the two (parole and probation)".*

If this court last year could see little substantive difference between probation and parole certainly it will disregard the appellee's arguments that they are now different and follow the mandate of the Supreme Court as set forth in MEMPA v. RHAY, supra, and order appellant's release because he was denied counsel.

Even if this Court were to refuse to rule for the appellant because he was denied the representation of the counsel available to him, it must under even the decisions cited by the appellee grant the appellant relief sought. The decision WASHINGTON v. HAGEN (CA3, 1960) 287 F.2d 332 cited by appellee clearly indicates that if a parollee doesn't get a fair hearing it is a matter for the Court to remedy in a habeus corpus proceeding. In so stating the court in WASHINGTON, supra, cited with authority US ex rel. McCREARY v. KENTON, DC D. Conn., 1960, 190 FS 689, which clearly indicated that a parole



violation hearing must be more than "pro-forma" proceeding in which in effect no consideration is given to the alleged parole violator's position.

The uncontroverted record here clearly indicates facts indicating that the alleged's hearing was a "pro-forms" proceeding. The uncontroverted affidavit of the appellant (R111-14) specifies in paragraphs 9 and 10 that there was no transcript made, that no one testified against him, that no documentary evidence was presented other than an unverified document which is believed to be the document containing the charges reproduced on pages 2 and 3 of appellee's brief. In short, this hearing was a star chamber proceeding which courts would have held in nullity even prior to the present due process requirement for counsel.

Even the appellees cases give an indication as to what was regarded for a fair hearing under prior due process decisions. The case U.S. v. REGAN (CA7, 1949) 177 F.2d 303, cited by appellees involved a fact situation where the court itself read the transcript of the hearing and concluded on the basis of the transcript that the hearing was fair. RICHARDSON v. MARKLEY, (CA7 1965) 339 F.2d 967, cited by the appellees involved a fact situation wherein counsel representation was waived; it specifically stated (p. 970):





*"...We believe that in fairness  
to a parolee a preliminary hearing  
should be promptly held at a location  
at or near the place of alleged vio-  
lation of parole."*

San Quentin definitely is not at or near the Los Angeles area. Appellant's hearing was held at San Quentin, not in the Los Angeles area where he was alleged to have committed the various crimes charged against him.

From this record this Court can see for itself that the alleged "hearing" accorded the appellant was nothing more or less than a sham conducted far from any acts that the appellant may have committed, far from witnesses, far from proof, on the basis of a single unverified document based upon a wife who was striking out against him. A "hearing" under these conditions is not in fact a hearing but is nothing less than a cruel hoax.

#### THIS COURT HAS JURISDICTION

On pages 19, 20 and 21 of their brief the appellee's have for the first time challenged the jurisdiction of this Court on the ground that the appellant has failed to exhaust his state remedies. It is believed that the appellees



are at this stage of the proceedings estoppel to raise this issue. No where in the record below did the appellees deny the appellant's right to Federal jurisdiction. They should not therefore have the right to bring this question up on appeal.

The jurisdiction of this Court is as indicated on the initial page of the appellant's brief. In 1964 this Court specifically held in SCHIERS v. PEOPLE OF THE STATE OF CALIFORNIA (CA9 1964) 333 F.2d 173, that once an issue of denial of constitutional rights was presented to a State Court and denied it was unnecessary for a petitioner to institute further State proceedings. The appellees have made no effort to distinguish this case, to show that it has been overruled or anything of the kind.

Instead the appellees have relied as authority upon a subsequently decided case, MOREHEAD v. STATE OF CALIFORNIA, (CA9, 1964) 339 F.2d 170 where a petitioner appearing in pro per was denied relief since he had not succeeded in getting California Courts to act on his request for relief on constitutional grounds. In MOREHEAD the State Courts had never denied relief whereas in this case the petitioner was specifically denied any relief by a Court of the State of California (R 116, 117 and 118). As further authority in its brief the appellees have cited FAY v. MOIA, 1963, 372 US 391, 9 Led, 2d



837, a case in which the petitioner had failed to exhaust his right of appeal in the State Courts and subsequently sought relief by habeus corpus in the Federal Courts. In an exhaustive opinion in this case clearly indicating that Federal Courts always have the right by habeus corpus to remedy a denial of due process by a State Court, the Supreme Court held that the petitioner had the right to the writ.

Thus even the authorities cited by the appellees support the fact that this Court can and in fact should entertain and grant the requested writ. This Court has specifically said that it is only necessary for a State Court to deny relief on a constitutional ground once. This happened in the present case. With the record of the conduct of the State of California in the present case one can hardly blame the appellant for seeking Federal and not State relief as soon as possible.

## CONCLUSION

The State clearly charged the appellant with crimes in such a manner that if convicted he would be imprisoned. It further held a "hearing" with respect to charges against him including the criminal charges, far from the area of any alleged wrong doing. It denied him of the counsel that had been retained to assist him at the hearing. It conducted the hearing without a reporter. It asked him to plead to the charges, including





criminal charges, against him and, on the basis of a single unverified document which on its face is based upon the allegations of a vindictive wife, found him guilty of these charges. As a result of this hearing the appellant is now in prison. With these facts the appellant rightfully wonders if the State of California of any of its instrumentalities have an element of fairness and can hardly have been expected to have gone back to this State for further relief.

This court has recently held that probation and parole violation matters are substantially equal or the same. MEMPA v. RHAY makes it clear that counsel is required in a probation matter. Therefore counsel is required also in a parole matter as is shown in the appellant's principal brief. For years the right of counsel has been fundamental at parole violation hearings in other areas, as required by due process, under the 14th Amendment to the Federal Constitution. This is shown by cases cited in appellant's principal brief.

At this point the appellant is indigent and can not afford counsel. Documents of all sorts have undoubtedly disappeared. The memories of witnesses have undoubtedly dulled. As pointed in GLEN v. REED, (CA, DC Cir., 1961) 289 F.2d 462, under these circumstances the appellant must be



released because it would be impossible to have a fair hearing and to undo the wrongs which have been done.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Edward D. O'Brian", written over a horizontal line.

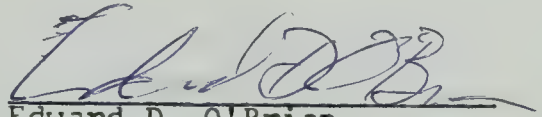
Edward D. O'Brian  
Attorney for Appellant

Anaheim, California  
January 30, 1968



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Edward D. O'Brian  
Attorney for Appellant

PROOF OF SERVICE

EDWARD D. O'BRIAN, Counsel for Appellant, GEORGE W. PALMER, in the above entitled matter hereby certifies that three (3) copies of the foregoing Brief were placed in the United States mail, with postage fully prepaid, addressed to DORIS H. MAIER, Assistant Attorney General, 500 Wells Fargo Bank Building, Fifth Street and Capitol Mall, Sacramento, California, on this 2nd day of Feb, 1968.



Edward D. O'Brian  
Attorney for Appellant



No. 22,084

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GEORGE W. PALMER,

APPELLANT,

VS.

LLOYD PATTERSON, ET AL,

APPELLEE,

---

PETITION FOR REHEARING

**FILED**

MAY 14 1968

WM. B. LUCK, CLERK

EDWARD D. O'BRIAN  
1695 CRESCENT AVENUE  
ANAHEIM, CALIFORNIA 92801

ATTORNEY FOR APPELLANT





## PETITION FOR REHEARING

This petition is being filed in accordance with Rule 23 of this Court. It is respectfully suggested that the decision dated April 16, 1968 in this appeal be considered by this Court en banc. This suggestion is made pursuant to the fifth part of this Rule 23. .

To understand why a request for a rehearing is being made in this case it is necessary to consider both the issues presented by the record and the reason for denying the relief sought by the appeal. The issues presented by the record concern what constitutes due process of law as required by the Fourteenth Amendment to the U.S. Constitution while the April 16, 1968 decision denied relief solely because the Appellant had not exhausted available state remedies.

The issue that the Appellant was denied due process of law was first presented to the California Tuolumne County Superior Court. By an order dated April 18, 1966, the Appellant was denied relief by the state court (R.16-18). Since the decision by this court in Schiers v. People of the State of California, 333 F2d 173 (9 Cir 1964) held that an issue of denial of constitutional rights only needed to be presented to a state court once before it could be presented to Federal



courts, and since it appeared that no relief could be obtained by further state proceedings the Appellant thereafter sought relief from the Federal courts.

This was done by petitioning for the Writ of Habeas Corpus in the lower court on the ground that Appellant had been denied the constitutional right of due process. In this lower court the Appellee did not even raise the issue of the exhaustion of state remedies, presumably because of the clarity of the Schiers decision, supra. In due course the lower court "was of the view that a substantial constitutional question was raised" by the petition, but denied the writ requested on the merits (R.118,119). The lower court then issued a certificate of probable cause so that this appeal could go forward (R. 123,124).

Thereafter the issue of exhaustion of state remedies was raised by the Appellee in its last section of argument in its brief. Here the Appellees did not even mention the Schiers case, supra, but cited two Federal cases, Morehead v. State of California, 339 F2d 170 (9 Cir 1964) and Fay v. Noia, (1963) 372 U.S. 391, 83 S.Ct. 822, 9 L Ed 2d 839. Nowhere have the Appellees attempted to discuss Schiers, supra. Apparently the attitude is that it doesn't exist.



But Schiers, supra, does exist. It has been cited in other circuits as authority for the power of Federal courts to decide constitutional issues where state remedies have not been exhausted. Note Shepard v. Maxwell, 346 F2d 732 (6 Cir 1965). Fay v. Noia, supra, indicates this power.

As it now stands, Schiers, supra, indicating that a denial of constitutional rights can be considered by Federal Courts after having been once presented to a state court appears to remain in effect. The Morehead v. State of California, supra, cited as authority cited in the April 16, 1968 per curiam decision in this appeal does not relate to the constitutional issues involved, but merely states a corollary of the Schiers' rule -- state courts must consider and deny a constitutional issue before such an issue will be considered by a Federal court. The Appellant did in fact obtain a denial of his constitutional claim by a state court. Under the circumstances, the decision in this case, relying on Morehead, supra, does not appear to change the interpretation of the law, but does in fact change it without clearly telling anyone.


In this day of changing views, prior decisions are often overruled. In so doing the courts should clearly indicate what they are doing so that decisions do not remain "on the books" which no longer represent the law. Hence, a





rehearing as to this appeal is necessary to avoid confusion  
as to others in the future.

George W. Palmer, Appellant

by:   
Edward D. O'Brian  
Attorney for Appellant



CERTIFICATE

I certify that, in connection with the preparation of this Petition for Rehearing, I have examined Rules 18, 19, 23 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Petition for Rehearing is in full compliance with those rules, and that in my judgment this Petition for Rehearing is well-founded, and that this Petition for Rehearing is not interposed for purposes of delay.



---

Edward D. O'Brian  
Attorney for Appellant

PROOF OF SERVICE

EDWARD D. O'BRIAN, Counsel for Appellant, GEORGE W. PALMER, in the above entitled matter hereby certifies that three (3) copies of the foregoing Petition for Rehearing were placed in the United States mail, with postage fully prepaid, addressed to JACK R. WINKLER, Deputy Attorney General, 500 Wells Fargo Bank Building, Fifth Street and Capitol Mall, Sacramento, Calif. 95814, on this thirteenth day of May, 1968.



---

Edward D. O'Brian  
Attorney for Appellant



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22087

MASARU SUMIDA, STANLEY UNTEN, CHARLEY  
T. SHIRAISHI, and WILLIAM S. ELLIS, JR.,  
as General Partners, and FLORENCE A.  
ELLIS, aka FLORENCE LUMAHAI ELLIS, as  
former General Partner, in the General  
Partnership of OLINDA ASSOCIATES and  
the Limited Partnership of KULA GARDENS  
ASSOCIATES, and Not Individually,

Debtor-Appellants,

and

KULA DEVELOPMENT CORPORATION and  
RALPH E. COREY,

Creditor-Appellants,

vs.

FUSAO YUMEN, KIMIYO YUMEN, J-R-M CORP-  
ORATION, MYRA DEANE CHARLTON, and  
MOLOKAI PROPERTIES, INC.,

Creditor-Appellees,

and

FARMLAND, INC.,

Adverse Claimant-Appellee.

No. BK-67-17

United States  
District Court  
for the District  
of Hawaii

The Honorable  
Martin Pence,  
Presiding.

ANSWERING BRIEF

and

CERTIFICATE OF SERVICE

FILED

UEOKA & VAIL  
Attorneys for Appellees  
Fusao Yumen and Kimiyo Yumen.

SEP 16 1968

WM. B. LUCK CLERK



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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22087 ✓

MASARU SUMIDA, et al., and  
KULA DEVELOPMENT CORPORATION,  
et al.,

Appellants,

vs.

FUSAO YUMEN, et al.,

Appellees.

---

No. BK-67-17

United States  
District Court  
for the District  
of Hawaii

The Honorable  
Martin Pence,  
Presiding

ANSWERING BRIEF

I. JURISDICTION

1. District Court. Jurisdiction of the United States

District Court for the State of Hawaii was based on Sec. 1(10) of the Bankruptcy Act, 11 U.S.C.A. Sec. 1(10), which specifies that courts of bankruptcy shall include United States district courts, and Sec. 2(a)(9), 11 U.S.C.A. Sec. 11(a)(9), which grants bankruptcy courts the authority to "Confirm or reject arrangements or plans proposed under this title . . . ."

Appellants filed a petition for a real property arrangement on January 17, 1967, pursuant to Chapter XII of the Bankruptcy Act (R. 2-23). The filing of the petition



immediately placed petitioners under the jurisdiction of the U.S. District Court for the State of Hawaii, sitting as a bankruptcy court.

Appellees challenged Appellants' petition by submitting a motion to dismiss (R. 92-95) the petition on February 9, 1967, contending that, inter alia, Appellants' arrangement did not contain adequate means for its execution (R. 96-132). The filing of the motion to dismiss placed Appellees within the jurisdiction of the bankruptcy court which set February 17, 1967, as the date for the hearing on Appellees' motion to dismiss.

At the hearing, the District Court granted Appellees' motion to dismiss after finding that it could not confirm Appellants' arrangement because, inter alia, the arrangement was not feasible (R. 314). Hence, it entered written orders of its decision on April 17, 1967 (R. 232-235). These orders were subsequently superseded by the revised orders entered on May 17, 1967 (R. 312-314).

2. Court of Appeals. Jurisdiction of the United States Courts of appeals is based on Sec. 24(a) of the Bankruptcy Act, 11 U.S.C.A. Sec. 47 (a), which authorizes these courts to review interlocutory or final decrees in "proceedings in bankruptcy". Sec. 24 is pursuant to Sec. 416 which provides



that appellate review of Chapter XII proceedings shall be the same as in a bankruptcy proceeding where not inconsistent with the provisions of Chapter XII.

Appellate jurisdiction also seems proper in this case because Appellants appear to have complied with Sec. 25(a), 11 U.S.C.A. Sec. 48(a), which requires that an appeal must be taken "within thirty days" after the losing party receives written notice of the entry of the judgment. In the case at bar, the judgment was entered on April 17, 1967 (R. 235) and Appellants filed their notice of appeal on May 17, 1967 (R. 307).

There are, however, authorities limiting the scope of this appeal. In Mulford v. Fourth Street National Bank, (C.C.A. 3, 1907), 157 F. 897, 85 C.C.A. 225, 19 Am. Bankr. Rep. 742, the district court judge refused to confirm an arrangement between the bankrupt and certain of his creditors who received preferential transfers. The Third Circuit Court





of Appeals ruled that the decision of the lower court was discretionary and reviewable only for abuse. Numerous other authorities are cited in 11 U.S.C.A. Sec. 47, pp. 682-683, holding that the appellate court must deem conclusive the findings of a bankruptcy court on questions of fact where such findings are sustained by substantial evidence.

In the instant case, the orders appealed from deal with the decision of the lower court which denied Appellants' motion for a continuance of the February 17 hearing and granted Appellees' motion to dismiss the arrangement (Transcript, p. 50-52). This decision was based on the finding by the lower court, inter alia, that the arrangement was not feasible and could not be confirmed (R. 312-314).

Under Mulford v. Fourth Street National Bank, supra, the refusal to confirm the arrangement by the lower court is a factual issue falling within the discretionary authority of the court. Consequently, Appellees respectfully contend that the United States Court of Appeals for the Ninth Circuit are bound to review the decision of the lower court only on the basis of whether or not that court abused its discretion in refusing to confirm the Appellants' arrangement.



## II. STATEMENT OF FACTS

Appellants filed a petition for a real property arrangement pursuant to Chapter XII, Bankruptcy Act, on January 17, 1967 (R. 2-23). They simultaneously filed a motion for extension of time to submit the necessary supporting papers of the arrangement (R. 24-29). Two additional motions for extensions of time were filed on January 26 and February 9, 1967 (R. 58-65; R. 71-74).

Meanwhile, on January 24, 1967, Appellants moved to stay the suits against them (Civil No. 11563 and Civil No. 12316) in the First Circuit Court of the State of Hawaii because of the petition in bankruptcy (R. 38-43). They also moved to stay or continue two other suits (Civil Nos. 586 and 817) in the Second Judicial Circuit on February 9, 1967 (R. 71-89).

After learning about Appellants' petition for a real property arrangement, Appellees Fusao and Kimiyo Yumen filed a motion to dismiss Appellants' petition on February 9, 1967 (R. 92-95). Appellees served the motion and a notice of the hearing on the motion to the counsel listed on the petition for arrangement, Mr. William S. Ellis, petitioner pro se, and Mr. Ralph E. Corey, Esq. (R. 2).



Appellees had no notice of the substitution of Mr. Harry T. Tamura as counsel for petitioners except William S. Ellis, Jr., which occurred on January 26, 1967 (R. 26-27). However, Mr. Tamura was served with the motion and notice of the hearing on February 13, 1967 (Opening Brief, p. 8).

In reply to Appellees' motion to dismiss, Appellants moved for a continuance of the hearing. Said motion was filed on February 14, 1967 (R. 142-143).

At the hearing on February 17, 1967, both the Appellants' motion to continue and Appellees' motion to dismiss were pending before the court (Transcript, p. 2). Upon finding that an automatic approval of Appellants' motion would result in substantial injury because Appellants' creditors have remained unpaid for several years (Transcript, p. 8), the court sought to obtain prima facie evidence as to whether or not Appellants' arrangement could be executed for the benefit of the creditors before granting the motion to continue (Transcript, pp. 12-13). After permitting Petitioner Ellis to testify extensively on the arrangement, the court found that the arrangement was not in the best interest of the creditors (Transcript, pp. 50-52). Consequently, the court denied Appellants' motion to continue and granted Appellees' motion to dismiss the arrangement (Transcript, p. 52).





Appellants sought a reconsideration of the decisions (R. 168-169), but the court affirmed its February 17 decisions at the April 26 hearing on the Motion to Reconsider.

The court entered its Orders Denying Motion for Continuance and Granting Motion to Dismiss on April 17, 1967 (R. 232-235), which was superseded on May 17, 1967, by the Amended Findings of Act and Conclusions of Law on Creditors' Motion to Dismiss and Debtors' Motion for Continuance (R. 312-314). On the same day, Appellants filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit (R. 315-317).

As to the questions to be considered on appeal, Appellees concur in the questions listed in Appellants' Opening Brief, Pages 15-16.



### III. ARGUMENT

#### A. Summary

Appellees' argument is primarily guided by the contentions of the Appellants in their opening brief.

Divided into five parts, the Appellees' argument shall prove:

1. The District Court had statutory authority to dismiss Appellants' petition for a real property arrangement.
2. The District Court properly exercised its authority to dismiss Appellants' petition.
3. Appellees, as creditors, had the right to challenge the propriety of Appellants' arrangement on jurisdictional grounds.
4. Appellants were afforded due process in that they were duly served with the motion to dismiss and with notice of the hearing and they were given full opportunity to be heard at the hearing.
5. The District Court did not abuse its discretion in denying Appellants' motion to continue the hearing since there were adequate grounds for dismissal of the petition, making a continuance totally unnecessary.



B. District Court has Authority to  
Adjudicate or to Dismiss a  
Chapter XII Petition

Section 18(f) of the Bankruptcy Act states that the filing of a voluntary petition under Chapters 1 to 7 of the Act, other than a petition filed in behalf of a partnership by less than all of the partners, operates as an adjudication. Consequently, by operation of law, a judge is prevented from hearing such a petition for the purpose of adjudicating or dismissing it.

The Appellants assert that "pursuant to Sec. 402 and Sec. 412(2) of the Act," Sec. 18(f) is also applicable to a Chapter XII petition, thereby depriving the District Court of any authority to dismiss its Petition for a Real Property Arrangement (Opening Brief, p. 23).

However, the Appellants overlook the fact that Sec. 402 and Sec. 412(2) incorporate the provisions of Chapter 1 to 7 only "insofar as they are not inconsistent or in conflict with the provisions of this chapter." (Sec. 402, Bankr. Act; 11 U.S.C.A. Sec. 802). Furthermore, they fail to observe that their attempt to apply Sec. 18(f) of the Act in the manner asserted in their brief would render impotent Sec. 481 of the Act, which expressly authorizes the



court to adjudicate or dismiss a Chapter XII petition under the circumstances specified therein.

The language of Sec. 481 states that a district court may dismiss a Chapter XII proceeding under certain circumstances, e.g., withdrawal or abandonment of the arrangement, where the interest of the creditors would be served. There is no language limiting the court solely to confirm or refuse to confirm the petition where the special circumstances described in Sec. 481 occur.

Even the authoritative source cited by the Appellants (Opening Brief, p. 23) states that under Sec. 412 only a "constructive adjudication for various purposes" occurs upon the filing of a Chapter XII petition "where not inconsistent with the provisions of Chapter XII". 9 Collier on Bankruptcy, 14th ed., sec. 3.02, p. 800. Emphasis added. Clearly, Collier does not hold that Sec. 412 automatically operates to effect a direct adjudication of bankruptcy under all circumstances upon the filing of a Sec. 422 petition as the Appellants contend in their brief.

In addition, there is case authority interpreting Sec. 481 as permitting a bankruptcy court to dismiss a petition for a real property arrangement. See Preas v. Kirkpatrick & Burks, et al., (C.A. 6, 1940), 1955 F.2d 802,





44 Am. Bankr. Rep. N.S. 503; In Re Potts, (C.A. 6, 1944),  
142 F.2d 883, 56 Am. Bankr. Rep. N.S. 175, cert. denied,  
324 U.S. 868, 65 S.Ct. 910; Meyer v. Rowen et al., (C.A. 10,  
1952), 195 F.2d 263. Specifically on point, one court stated:

"The jurisdiction to adjudicate or dismiss is  
vested in the court . . . \* \* \* \* The statute  
empowers the court either to adjudicate or dismiss.  
The alternative to be adopted must be in the  
interest of the creditors. The interest of the  
debtor is ignored." In Re Potts, (C.A. 6, 1944),  
142 F.2d 883, at 891.



C. District Court Properly  
Dismissed the Chapter XII Petition

The District Court dismissed the Appellants' petition for a real property arrangement because "it appears that the major creditors are opposed to the proposed arrangement" and because

"... the debtors' proposal is so unfeasible, so entirely lacking in merit, is so unreasonable in the treatment of the creditors, and based on conditions so improbable of fulfillment, that this court could not approve and confirm debtors' plan even if adopted by the creditors. . . ."  
(R. 314).

The grounds for dismissal relied upon by the lower court are firmly rooted under Sec. 468, Sec. 472 and Sec. 481 of Chapter XII of the Bankruptcy Act. Under Sec. 468, "the creditors of each class, holding two-thirds in amount of the debts of such class" must accept the arrangement in writing before "an application for confirmation of an arrangement may be filed with the court". Sec. 472 authorizes the court "to confirm an arrangement if satisfied that--... (2) it is for the best interests of creditors and is feasible; . . . (4) the proposal and its acceptance are in good faith. . . ." Finally, Sec. 481 provides for the dismissal of the petition "if confirmation of the arrangement is refused".



Section 468:

In this case, the lower court found that the Appellants had not obtained the consent of any of the secured creditors listed in Schedule B of their petition (Finding No. 3, R. 313). There was no showing by the Appellants during the hearing that acceptance of their arrangement by at least two-thirds of the secured creditors would be possible, thereby putting Sec. 468 into operation to bind the Creditor-Appellees herein who are opposed to the arrangement. (R. 45-47).

On the contrary, it appeared that the debtors could not obtain the requisite acceptance by the secured creditors. First, the arrangement requires the secured creditors to subordinate their claim to a mortgage to Kula Development Corporation, whose officers and directors are essentially the same as the individuals listed as partners for the insolvent partnerships herein (Transcript, p. 17). Secondly, as will be shown, *infra*, Kula Development Corporation was probably insolvent at the time the arrangement was filed. Thirdly, no new creditors had committed themselves to finance the rehabilitation of Olinda Associates, Kula Garden Associates or Kula Development Corp., and no definite plan to obtain additional financing was set forth in the arrangement or at the hearing (Transcript, p. 21, pp. 34-37).





Where it appears certain that the debtor could not obtain the acceptance required by Sec. 468, a court may dismiss the arrangement without further delay. In Re Harweg, (C.C.A. 7, 1941), 119 F.2d 941, the appellate court affirmed the dismissal by the lower court of the debtor's Chapter XII petition upon the lower court's finding that the debtor had

" . . . obtained the consents of none of her secured creditors to her proposal, and it appeared to the court from statements made during the course of the proceeding before him that the arrangement was not acceptable to the holders of the first mortgage bonds, and that the debtor would be unable to obtain any consents." Ibid., at 942. See also: In Re Potts (C.A. 6, 1944), 142 F.2d 883, 56 Am. Bankr. Rep. N.S. 175, cert. denied, 324 U.S. 868, 65 S.Ct. 910; Preas v. Kirkpatrick & Burks et al (C.C.A. 6, 1940), 115 F.2d 802, 44 Am. Bankr. Rep. N.S. 503; In Re Chalkley (E.D. Tenn., 1940), 84 F. Supp. 969.

Furthermore, Sec. 468(1) provides that "payment or protection" of creditors who do not accept the arrangement is required in accordance with Sec. 461(11). Pursuant to this requirement, the lower court found that no protection was afforded non-accepting secured creditors in Appellants' petition (Finding No. 4, R. 313), although Paragraph XVI of the arrangement (R. 19) proposes that the conveyance of such creditors' property to Kula Development Corp. shall be subject to the debts owing these creditors, provided that



these creditors "will compromise and settle on such terms as not to interfere with or negate the purpose and effect of this arrangement".

Paragraph XVI obviously attempts to comply with the first method specified under Sec. 461(11) as providing adequate protection to non-assenting creditors "by the transfer or sale, or by the retention by the debtor, of such property subject to such debts". However, this attempted compliance must fail on two grounds. First, the provision itself contains a condition which precludes any protection to opposing creditors unless they "compromise and settle" their debts on general, unspecified terms which would not "interfere with or negate the purpose and effect of this arrangement". In effect, this condition could alter the rights of the secured creditors even though the conveyance to Kula Development Corp. is subject to the secured debts. In this event, "the arrangement as such must fail if it provides for the first method of protection under Sec. 461(11) and it is not accepted by two-thirds in amount of the debts of any class." 9 Collier on Bankruptcy, 14th ed., Sec. 8.12, p. 1084. Since the Appellants were unable to show that the required two-thirds acceptance would be possible, the protection of Appellees under their arrangement was inadequate.



Secondly, the conveyance of opposing creditors' property to Kula Development Corp. would be a "speculative venture". (Finding No. 4, R. 313) The court found that Kula Development Corp. has no cash assets (Transcript, p. 24), it has a debt of \$200,000 which has been outstanding since 1961 (Transcript, p. 26), it has not had any bookkeeping records since 1961 (Transcript, p. 27), and it has no source of income other than the development of certain lands in which it has some interest (Transcript, pp. 28-29), but whose state of development at the time of the hearing was apparently inadequate for the sale of such lands to obtain enough income to pay off its debt of \$200,000. Furthermore, Appellant Ellis disclosed at the hearing that Kula Development Corp. was considering filing a Chapter X or XI petition with regard to its debts as they mature (Transcript, pp. 33-34). Finally, Appellant Ellis testified that the arrangement is designed to obtain new financing which would take care of existing obligations, provided the presently secured creditors would subordinate their claims to the new creditors (Transcript, p. 29). Yet, at the time of the hearing, Ellis could not cite a firm commitment from any one person who would invest in Glinda Associates, Kula Gardens Associates or Kula Development Corp. (Transcript, p. 21).



In Rader v. Roy (C.C.A. 10, 1958), 252 F.2d 585, the debtor's proposed arrangement "provided for the retention of the bankrupt estate by the debtor, subject to the debts, and deferred any further payments to the creditors" for a few months, during which time the income from debtor's oil runs would be allowed to accumulate. 252 F.2d 585, at 587. The accumulated income would then be used to drill one, two or three wells, depending upon the success of the first and second wells. If all three wells were successful, the secured creditors would finally begin receiving payment on the debts. Ibid.

The Court of Appeals of the Tenth Circuit stated:

"In short, the plan provided for a speculative venture with accrued funds belonging to the secured creditors.

"We agree with the trial court that an arrangement which offers no more than a speculative venture with creditor's funds is not adequate protection for the secured creditors, and therefore not feasible within the contemplation of the Bankruptcy Act."

Ibid.

The arrangement proposed by the Appellants is very similar to Appellant Rader's proposal, *supra*, in the method of obtaining income. Both arrangements are dependent upon the success of another venture, and this contingency determines whether or not the secured creditors receive any payments. However, the arrangement herein is less protective of the secured creditors than the Rader arrangement because Appellants





would force the secured creditors to subordinate their claims to those of the new creditors before new financing would be possible. Rader's arrangement merely asked for a deferment of payments to the secured creditors. Clearly, under Rader v. Boyd, the arrangement herein would be struck down as providing inadequate protection to secured creditors as required by Sec. 461(11), pursuant to Sec. 468(1).

Section 472:

In general, Sec. 472 does not apply to all real property arrangements. It is applicable to only those arrangements which "have been accepted by the requisite amount of claims as prescribed by Sec. 468 . . . ." 9 Collier on Bankruptcy, 14th ed., Sec. 9.07, p. 1134. Thus, assuming arguendo that Appellants herein could have obtained acceptance under Sec. 468, the petition would still be dismissed because the arrangement failed to meet the conditions to confirmation prescribed by Sec. 472.

Under Sec. 472, the district court has the authority to confirm or not to confirm the debtor's arrangement, depending on whether or not it is satisfied that the arrangement meets the specific conditions listed therein. Hence, if the court is not satisfied that the arrangement is "for the best interests of creditors" (Sec. 472 (2)), or that the "proposal and its



acceptance are in good faith" (Sec. 472(4)), it may refuse to confirm the arrangement. See: United Properties Inc. v. Emporium Dept. Stores, Inc. (C.C.A. 8, 1967) 379 F.2d 55; In Re Milwaukee Corp. (C.C.A. 7, 1938), 99 F.2d 686; In Re Hoxie et al (D.C. Me., 1910), 180 F. 508.

The broad discretion given the district court is exemplified in Gonzalez Hernandez v. Burgos (C.C.A. 1, 1965), 343 F.2d 802. In reference to Sec. 472, the First Circuit Court of Appeals stated:

"The fact that two-thirds, or even all, of the creditors who have filed proofs of claim may have accepted a proposed arrangement under Chapter XII does not, ipso facto, require the confirmation of the arrangement. Chapter XII places the duty upon the district court to consider whether the arrangement complies with all the statutory requisites before it may be confirmed. Among these are that 'it is for the best interests of creditors' and is proposed 'in good faith.'" 343 F.2d 802, at 805.

In the Gonzalez Hernandez case, the appellate court affirmed the non-confirmation by the district court of debtor's real property arrangement even though "all creditors affected thereby had accepted the plan in writing, that the deposit required for priority claims, fees and costs had been made . . . ." Ibid., at 804. The court struck down the arrangement under Sec. 472 because the debtor attempted to use a Chapter XII proceeding to circumvent making support



payments to his dependent children. Ibid., 895-896. Classifying the dependent children as creditors, the court held that the arrangement was not in their best interest and was submitted in bad faith. Ibid.

The test to determine whether or not an arrangement is for the best interests of creditors is a comparative one. "Where the composition offer would pay creditors considerably less than they might reasonably expect to realize in liquidation, the composition. . . was not for the best interests of creditors." 9 Collier on Bankruptcy, 14th ed., 9.07(3), p. 1137.

In this case, Appellants filed for a real property arrangement after numerous foreclosure actions were instituted against them (R. 11-12). By taking this course, the Appellants were able to stay several foreclosure suits.

However, under Appellants' arrangement, the secured creditors are asked to surrender their preferred status to a corporation which may itself be insolvent already. Furthermore, as noted, supra, the corporation has no new sources of income to rejuvenate the corporation and to insure the success of the arrangement. Thus, the amount the secured creditors could expect to realize under the arrangement is completely unknown and may in fact be nothing as in Gonzalez Hernandez, supra.





Admittedly, a foreclosure action is not the same in procedure as a liquidation of assets by a bankrupt. However, in this case, the effect of both actions would be identical. The only assets of the partnerships herein appear to be the real property listed in their arrangement (A. 23). Foreclosure by the various secured creditors of the real property would in effect divest the Appellants of this property, the same result as under a liquidation of assets. Thus, under the foreclosure alternative, the secured creditors would at least realize the value of the property secured by them. Under the Appellants' composition, the secured creditors are given only a promise of payment, depending on new investments.

Before confirmation is possible, § 472(2) also requires that the arrangement be feasible.

"The (feasibility) test is whether the things which are to be done after confirmation can be done as a practical matter under the facts. That necessarily depends on the varying facts of each particular case. It refers to the probability that the creditors will receive the amount of money provided for them pursuant to the arrangement, . . . . There should be considered the adequacy of the capital structure, the earning power of the property, economic conditions, the ability of the management, and any other related matters which determine the prospects of sufficiently successful operation to enable performance of the provisions of the arrangement." 9 Collier on Bankruptcy, 14th ed., 9.07(3), p. 1139. See Also Price v. Spokane Silver & Lead Co., (C.A. 8, 1938), 97 F2d 237, at 248.



A recent, pertinent case is United Properties Inc. v. Superior Court of California, 379 P.2d 55, 111 Cal.2d 55, which decided, inter alia, the question whether or not debtor's arrangement had "a reasonable chance of success". Ibid., 65. Although the debtor had filed a Chapter XI petition, the feasibility of the arrangement was at issue under Sec. 366, the counterpart of §472 herein.

In United Properties Inc., the debtor's arrangement was found unfeasible because:

- (1) The ratio of current assets to current liabilities was substantially less than two to one. Ibid., 66.
- (2) The solvency of the Debtor is questionable. Ibid., 68.
- (3) The evidence fails to establish that the Debtor could operate at a profit. Ibid.
- (4) The cash flow was inadequate. Ibid., 69.

To reach these conclusions, the court reviewed the financial statements of the debtor. Also, it noted the lack of a comprehensive "projection of future earnings or cash flow", and an "independent appraisal of the inventory, the Accounts Receivable or other assets". Ibid., 65.

In this case, the arrangement can operate only if the secured creditors are willing to subordinate their claims to that of Kula Development Corporation (R. 15-18). Yet, as



already shown, supra, the financial status of the corporation is at best uncertain, and more likely, to be insolvent. No financial statements are available to determine its status and the existence of any current income.

Also, the possibility that the arrangement shall work successfully is dependent upon the sale of real property or the acquisition of new financing (Transcript, p. 13-14). Yet, as noted, supra, the development of the corporate real property for profitable sale appears negligible and no new investors have committed themselves to help in the financial recovery of the corporation.

Another factor which precludes the possibility of success of the arrangement is that the officers and directors of the corporation include the same individuals listed as partners in the Appellants, Olinda Associates and Kula Cardon Associates (Transcript, p. 17). These individuals have managed to guide two partnerships into insolvency, and may have already done the same to the corporation. Yet, they want another opportunity to speculate with the secured creditors' property. Neither the court nor the creditors could be expected to place any confidence in the competency of these individuals, particularly where the arrangement would subordinate the secured creditors' preferred status to the corporation



managed by the financial wizards of the bankrupt partnerships.

The appellate court in United Properties Inc. was also faced with a "management that had led a successful corporation into financial difficulties" (C.A. 8, 1967), 379 F.2d 55, 70, but could not conclude that this factor would help prevent the success of the composition. It found the arrangement unfeasible only on the grounds noted, *supra*.

However, in the case at bar, essentially the same people have led not one, but two and possibly three, business enterprises into insolvency. Their management of the corporation would certainly be a factor in determining the feasibility of the arrangement herein.

Finally, the arrangement proposes that Appellant Ellis act as "arrangement manager" (R. 13). Yet, the lower court found that Appellant Ellis was too busy to file all the papers required for a Chapter XII petition, requesting three extensions of time for said filing (R. 24-29, R. 58-65, and R. 71-74); too busy to prepare for the February 17, 1967 hearing (Opening Brief, p. 9); and too busy for about a year to "follow through on 30 or 40 contacts" for the sale of property belonging to a Howard Whitney although the owner allegedly indicated that "if I (Ellis) could perform on that





particular property he'd be happy to come along with me on other ventures", such as investing in the partnerships herein and Kula Development Corporation (Transcript, p. 35). Mr. Ellis' past performance makes his ability to perform as arrangement manager very questionable.

On the above facts, the chance of success of the composition herein is certainly doubtful and the lower court correctly found it unfeasible.

Section 472(4) establishes the requirement that the arrangement be in good faith. However, the meaning of good faith is not defined. Hence, the "basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of Chapter XII in the proposal," and the court must examine the conditions existing when the petition was filed and the acts subsequent to filing. 9 Collier on Bankruptcy, 14th ed., 9.07(6) p. 1144-1145.

The one limitation on the definition of "good faith" appears to be the Supreme Court statement in John Hancock Mutual Life Insurance Co. v. Bartels, 308 U.S. 180, 60 S.Ct. 221 (1939), in which the Court excluded the "imputation of lack of good faith to a farmer-debtor" from Section 75 because of the "absence of a reasonable probability" of his



financial rehabilitation. Ibid., 184. Even assuming that the exclusion applies to Chapter XII petitions, Sec. 472(2) which requires the district court to be satisfied that the composition is "feasible" before it may be confirmed is unaffected. Section 75, which related to agricultural compositions, did not contain a provision comparable to Sec. 481 which authorizes dismissal of a Chapter XII petition where the arrangement does not receive confirmation.

Moreover, even the good faith definition of John Hancock would be applicable in the instant case. The Supreme Court stated that the good faith reference in Sec. 75(i) "hits at secret advantages to favored creditors or other improper or fraudulent conduct". Ibid., 185.

Of significance is the fact that Kula Development Corporation is a Class F creditor in Appellants' arrangement, four categories below the Creditor-Appellees herein (R. 22). However, the arrangement calls for the secured creditors in Class B to subordinate their claims to Kula Development Corporation. The critical question arises, Why propose such an arrangement?

As already noted, *supra*, Kula Development Corporation is probably insolvent; it has no current income; it had not published any financial statements for approximately six years



prior to the hearing in February 1967; it had not obtained any new creditors to rehabilitate the corporation, let alone the new venture proposed under the composition. Obviously, the reason for selecting Kula Development Corporation as the financial savior of the bankrupts herein was not based on financial considerations.

Rather, the reason appears to be the fact that the people involved in Kula Development Corporation are largely the same individuals as the partners herein (Transcript, p. 17). Appellants' arrangement would make Kula Development Corp. a secured creditor whose priority would jump from number six to number two, second only to the State of Hawaii. Hence, it directly favors a subordinate creditor which in turn favors the very same individuals involved in the partnership-debtors. It discriminates against the presently secured creditors, which is exactly the situation that the Supreme Court warned against in its definition of "good faith" in John Hancock, supra.

A pertinent case is Frakas v. Katz (C.A. 5, 1932), 54 F.2d 1061, in which the bankrupt transferred his assets to a corporation dominated by him. The court concluded that the transfer was fraudulent and voidable because





" . . . the bankrupt reserved a substantial benefit to himself; the transfer resulting in his retaining complete control of the transferred assets and the beneficial ownership of a 98 per cent interest in them. A necessary effect of the transfer was to hinder or delay creditors by putting the transferred assets beyond the reach of legal process in their favor." Ibid., 1062.

The odor of bad faith is particularly heightened by the allegations of the general partners in their petition that they hold "equitable and/or legal title" to the real property listed in the arrangement "in trust" for the partnerships (R. 4). The record clearly shows that at least to the agreements of sale between the individual appellants and Appellees Fusao and Kimiyo Yumen, J-R-M Corporation and Myra Deane Charlton there is no reference to a trust arrangement or to the individuals as partners acting on behalf of Olinda Associates and Kula Garden Associates (R. 96-132, Transcript, p. 23-24, respectively). By such allegations, the individuals conspired to fraudulently place the real property owned by the abovementioned Appellees under a Chapter XII proceeding, thereby hindering any foreclosure actions available to said Appellees to regain possession of their property.

The record also reflects Appellants' fraudulent action against Adverse-Claimant Appellee (R. 245-255). The officers and directors of Kula Development Corporation, which



include the same individuals as the partners herein, used their position of trust and confidence to obtain a second mortgage from Farmland, Inc., on property which the corporation did not own (R. 247-249). Now, they are using the Bankruptcy Act to prevent Farmland, Inc. from perfecting their second mortgage (R. 249-251).

The conclusion following from the abovementioned facts is that the Appellants' arrangement is not in good faith as required by Sec. 472(4), and cannot be confirmed. Iden v. New York Life Insurance Co. (C.A. 4, 1939), 107 F.2d 695.

#### Section 481:

Where the creditors have not accepted the arrangement or where confirmation is refused, Sec. 481 authorized the district court to either adjudge the debtor a bankrupt or dismiss the Chapter XII proceeding, "whichever in the opinion of the court may be in the interest of the creditors". Thus, by its own terms, Sec. 481 becomes applicable where, inter alia, the debtor is unable to fulfill Sec. 468 (creditors' acceptance) or Sec. 472 (court confirmation). Also, Sec. 481 gives the court a choice between adjudging the debtor a bankrupt or dismissing the petition, depending upon which alternative serves the creditors' best interests.



The Seventh Circuit Court of Appeals interpreted Sec. 481 in Re Herweg (C.A. 7, 1941), 119 F.2d 941. As in the instant case, Debtor-Herweg had failed to fulfill Sec. 468 and Sec. 461(11). The Court of Appeals affirmed the lower court's dismissal of the petition stating, "Sec. 481 provides for procedure in case an arrangement is withdrawn or abandoned, or if no arrangement is accepted. Ibid., 943. See also In Re Potts (C.A. 6, 1944), 142 F.2d 883, 890-891; 56 Am. Bankr. Rep. N.S. 175, cert. denied, 324 U.S. 868, 65 S.Ct. 910; Preas v. Kirkpatrick & Burks et al (C.A. 6, 1940), 115 F.2d 802; 44 Am. Bankr. Rep. N.S. 503; In Re Chalkley (E.D. Tenn., 1940), 84 F.Supp. 969.

As to dismissal of the Chapter XII petition because the debtor could not obtain confirmation by the court, the case authorities cited in the discussion of Sec. 472, supra, is pertinent. Although those cases do not refer to Sec. 481 specifically, a logical reading of the cases clearly indicates that Sec. 481 is the basis of the district court authority to dismiss. See: 9 Collier on Bankruptcy, 14th ed., Sec. 10.01, p. 1194-1197.



D. Creditors Have The Right to Move For  
Dismissal of a Real Property Arrange-  
ment on Jurisdictional Grounds

The general rule is: Creditors may not oppose a voluntary petition in bankruptcy. See In re Ives (C.C.A. 6, 1902), 113 F 911. This rule seems applicable to a real property arrangement for there "is no provision in Chapter XII or applicable thereto which permits the filing of an answer to the debtor's petition for relief or which requires that the petition for relief be approved." 9 Collier on Bankruptcy, 14th ed., Sec. 4.11, p. 862. The appellants correctly note this rule and contend that Appellees Fusao and Kimiyo Yumen's motion to dismiss, in which the other Appellees herein later joined, was improper (Opening Brief, p. 24).

However, as in the case of most general rules, there is an exception to the above-mentioned rule. 9 Collier on Bankruptcy, 14th ed., Sec. 4.12, p. 863-864. The case of Chicago Bank of Commerce et al v. Carter (C.C.A. 8, 1932), 61 F.2d 986, specifically sets forth the exception:

"At the threshold of this controversy, we are met with the objection that the appellants, being creditors, could not maintain petitions to vacate the adjudication in bankruptcy on a





voluntary petition. As a general rule, a general creditor has no such standing in a bankruptcy court as to entitle him to move to vacate an adjudication made in a voluntary proceeding. In re A. C. Wagy & Co. (C.C.A.) 22 F.(2d) 9, 11; In re Ann Arbor Mach. Corp. 911. In the instant case, however, the motions challenged the jurisdiction of the court, and any interested party may raise the question of jurisdiction, or the court on its own volition may determine the question. We think it is fairly well established, both on authority and principle, that a creditor may attack even an adjudication in a voluntary proceeding on the ground of either jurisdiction or fraud upon the court. Zeitinger v. Hargadine-McKittrick Dry Goods Company (C.C.A.) 244 F.719; In re Garneau (C.C.A.) 127 F.677, 680; In re Guanacevi Tunnel Co. (C.C.A.) 201 F. 316, 319; In re Elmira Steel Co. (D.D.) 109 F. 456; Vassar Foundry Co. v. Whiting Corp. (C.C.A.) 2 F.(2d) 240. Ibid., 989.

This exception is clearly approved by the United States Supreme Court in Securities and Exchange Commission v. U.S. Realty & Improvement Co., 310 U.S. 434, 60 S. Ct. 1044 (1940). In fact, the Court appears to have extended the exception, *supra*, when it stated:

" . . . it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition, to move for the vacation of an adjudication or the dismissal of a petition on grounds, whether strictly jurisdictional or not, that the proceeding ought not to be allowed to proceed." Ibid., 457-458.  
Emphasis added.



Of significance, also, is the fact that this case was decided on May 27, 1940, about two years after the amendment to §18(b). Appellants claim that this amendment deprived creditors of the right to contest an involuntary petition, and a fortiori, Appellees could not oppose a voluntary petition in bankruptcy (Opening Brief, p. 24). Undoubtedly, the Supreme Court was aware of the 1938 amendment when the above case was decided, but interpreted it as merely providing debtors in involuntary bankruptcy proceedings the same protection against creditors as voluntary bankrupts without abolishing the exception it espoused. Thus, Appellants' "a fortiori" argument is untenable.

In the case at bar, Appellee Yumen submitted a motion to dismiss the arrangement on four grounds (R. 96-132):

- (1) The petition fails to state a claim upon which relief can be granted;
- (2) Debtors' proposed real property arrangement is not proposed in good faith in that it provides no adequate means for execution of the arrangement;
- (3) Debtors' petition and proposed arrangement is not to work a modification of terms of payment with creditors, but solely to give debtors time to refinance the whole debt and pay off present creditors;



- (4) The movants, Fusao and Kimiyo Yumen, and their address are not included in Debtors' Appendix B to petition, List of Creditors, as more particularly required by the Bankruptcy Act.

Within the first objection, Appellee Yumen questioned the validity of the partnerships' right to a Chapter XII proceeding. Sec. 406 requires that a Chapter XII debtor be "the legal or equitable owner of real property of a chattel real which is security for any debt". However, Appellee Yumen noted that the substantive law of the State of Hawaii does not authorize partnerships to hold title, legal or equitable, to real property. Also, since the individual appellants may hold only equitable title to real property which was conveyed to them by agreement of sale--as in Appellee Yumen's case--they could not hold such title "in trust" for the partnerships. Finally, the agreement of sale executed by Appellee Yumen conveyed the property to the individuals alone, not to the partnerships or to the individuals as general partners. (See the discussion in R. 96-132).

Thus, in raising the issue regarding the validity of the Partnership-Appellants' ownership, legal or equitable, of the real property listed in their arrangement, Appellee





Yumen questioned the propriety of Appellants' Chapter XII proceeding. If the partnerships did not own any real property, then they could not seek relief under Chapter XII. See In Re Chalkley (E.D. Tenn., 1940), 84 F.Supp. 969.

In other words, Appellee Yumen's motion to dismiss on the ground that the partnerships did not own real property was essentially a challenge to the district court that it did not have jurisdiction over the Debtors and was without authority to stay under Sec. 414 the commencement or continuance of any suits against them. Appellee Yumen's challenge has its foundation in Re Tinkoff (C.C.A. 7, 1946), 156 F.2d 405, where the Seventh Circuit Court of Appeals concluded, inter alia, that:

- (1) Dismissal of the petition for real property arrangement for lack of jurisdiction was proper where the petitioner did not have any interest in real property;
- (2) Since the court lacked jurisdiction, "it had no authority to do anything other than order a proper distribution of the fund in the hands of its trustee." (Ibid., 407).

Even aside from the jurisdictional issue, supra, the Appellees' motion to dismiss must be allowed to stand



in this case where Appellants did not limit their appearance at the hearing to a special appearance on the question of whether or not creditors may file a motion to dismiss a petition for a real property arrangement before the creditors' meeting. By making a general appearance at the hearing, Appellants waived their right to object to Appellees' standing to bring the motion. Kuntz v. Young (C.A. 8, 1904), 131 F. 719; In re Elby (N.D. Iowa, E.D., 1907) 157 F. 935; In re Figenbaum (C.A. 2, 1903), 121 F. 69.

A waiver of their right to object is reasonable under the circumstances of this case. At the hearing, Appellants did attempt to substantiate the feasibility of their arrangement but failed. For this Court to accept Appellants' claim now that Appellees' motion was improper would force the lower court to "retry an issue already tried and determined between the same parties". In Re Figenbaum (C.A. 2, 1903), 121 F. 69, 70. See discussion at R. 278-284.



E. Appellants were Afforded  
Due Process of Law

The Federal Rules of Civil Procedure are made applicable to bankruptcy proceedings "in so far as they are not inconsistent with the Act" by Order 37 of the General Orders in Bankruptcy. Pertinent to the issue of due process in this case are Rule 5(a) which requires service of a motion "upon each of the parties" and Rule 6(d) which requires notice of a hearing to be served five days prior to the hearing date. Appellants contend that Appellees violated both rules, thereby denying them due process of law (Opening Brief, p. 29).

Appellants obtain the definition of due process (Ibid.) from the Illinois Supreme Court in Durkin v. Hey, N.E.2d 463, 466; 376 Ill. 292. The elements are (1) notice and (2) an opportunity to be heard and defend in an orderly proceeding. Although there is no such case in 22 N.E.2d 463, we may assume that the definition is proper because even under Appellants' definition of due process the facts of the case clearly show that all interested parties in this case were afforded their constitutional and legal rights.

Appellants allege that Appellees violated Rule 5(a) when Appellees failed to serve notice of the February 17



hearing to all of the creditors involved in the arrangement. They construe the term "parties" to include the debtor and all of its creditors (Opening Brief, p. 29).

Appellees do not agree with Appellants' interpretation as applied to the case at bar. A proper interpretation of Rule 5(a) as applied to proceedings in bankruptcy is the following:

"Under Rule 5(a) as amended, 'all parties' are to be served. A possible interpretation of the amended rule would require service on all persons who have made an appearance in the over-all bankruptcy proceeding, or filed papers therein, including for example, all creditors filing claims. As Judge Clark noted in a related context, 'Clearly a bankruptcy court must have some leeway to take up matters involving certain claimants only without the necessity of opening the whole case at large before it'. (Elias v. Clarke (C.C.A.2d, 1944) 143 F2d 640, 644, 8FR Serv 42 b. 12, Case 1) This leeway would be provided by an alternative, and, it is believed, more desirable, interpretation of the application in bankruptcy of amended Rule 5(a). General Order 37 provides that 'in proceedings under the Act' the Rules shall be followed 'as nearly as may be,' and that the court may modify the rules for the preparation or hearing of 'any particular proceeding.' A reasonable construction of General Order 37 and Rule 5(a) would require service only upon parties to the 'particular proceeding' before the court. Such a construction would provide the flexibility necessary in bankruptcy proceedings, and would, at the same time, comport with the purpose of the 1963 amendment to Rule 5(a) of promoting full exchange of information among the parties to the action, since all the parties to the particular proceeding would be fully informed. To illustrate. In the





ordinary reclamation proceeding the 'parties' for purposes of Rule 5(a) would be the reclamation petitioner and the trustee." 2 Moore's Federal Practice, 2d ed., Sec. 5.04(2), p. 1334-1335.

Under the facts of the instant case, Appellees have complied with both interpretations of Rule 5(a), supra. Since Appellees submitted their motion to dismiss before the other creditors filed their claims and before any other person had made any appearance in a bankruptcy proceeding (R. 92-95), the only persons involved in the proceeding and the only persons required to be served with the motion were the Appellants.

Also, under the more desirable interpretation, the only parties to be served with Appellees' motion to dismiss were the Appellants since no trustee had yet been selected. A particular proceeding involving the determination of the propriety and feasibility of Appellants' arrangement was to be held, and the district court had the discretionary authority under Rule 5(a) and General Order 37 to require service of the motion only upon the petitioner of the arrangement.

Furthermore, since this case involved a real property arrangement, service to all creditors would not be required. Sec. 472 unequivocally authorizes the district



court to refuse confirmation of an arrangement notwithstanding its acceptance by the requisite number of creditors. Gonzalez Hernandez v. Borgos (C.C.A. 1, 1965), 343 F.2d 802. Yet, the only purpose of the notice of the motion to the creditors would be to have them at the hearing to accept or refuse to accept the Appellants' arrangement. Because the only issue before the court was the arrangement itself--its feasibility and good faith, not the validity or invalidity of the creditors' claims (Transcript, p. 12-13)--and because under Sec. 472 the district court could overrule the creditors anyway, whether or not they were present at the hearing, service of the motion to dismiss to the other creditors in this case would have been superfluous.

As to Rule 6(d), the Appellants allege that the Appellees violated it when they failed to serve the motion and notice of hearing five days prior to the hearing date to the attorney for petitioners except William S. Ellis, Jr. (Opening Brief, p. 30).

Appellees' motion and notice of hearing were served on the attorney for petitioners except William S. Ellis, Jr. and on William S. Ellis, Jr., petitioner pro se, as listed on the Appellants' petition for a real property arrangement, on



February 9, 1967, eight days prior to the February 17 hearing (R. 92-95). Appellees had no notice of the substitution of counsel for petitioners except William S. Ellis, Jr., which occurred on January 26, 1967 (R. 56-57). Although Appellees are grateful to Appellant Ellis for sending the motion and notice of the hearing to the substituted counsel on February 13, Appellees must contend that (1) the loss of one day notice to the substituted counsel for petitioners except Mr. William S. Ellis, Jr. was not unduly prejudicial to the Appellants herein and (2) Appellants were afforded an opportunity to be heard and defend in an orderly proceeding.

The Fifth Circuit Court of Appeals in Herron v. Herron, (C.A. 5, 1958), 255 F.2d 589, stated:

"Under Rule 6(d) appellant was entitled to five days notice of the hearing of a motion to dismiss. Rule 6(d) is not a hard and fast rule, however, and if it is shown that a party had actual notice and time to prepare to meet the questions raised by the motion of an adversary, Rule 6(d) should not be applied." Ibid., 593. See also Anderson v. Brady (E.D. Ky., 1945), 5 F.R.D. 85; Foley Lumber Industries, Inc. v. Buckeye Cellulose Corporation (C.C.A. 5, 1961), 286 F.2d 697.

The fact that certain district courts are permitted to revise the time for noticing motions adds weight to the position taken by the Fifth Circuit with regard to Rule 6(d),





supra. In fact, some "local rules have reduced the length of notice for certain motions, sometimes to less than 24 hours." 2 Moore's Federal Practice, 2d ed., Sec. 6.10, P. 1495.

In the instant case, the five-day notice period in Rule 6(d) should not be construed as being absolute, the violation of which would result in immediate, automatic dismissal of this case. Rather, the reasonable and proper construction of Rule 6(d) would be the Fifth Circuit view, to wit, whether or not Appellants had "actual notice and time to prepare to meet the questions" raised by Appellees' motion.

Although the petitioners represented by the substituted counsel did not obtain the full five-day notice period, co-petitioner William S. Ellis, Jr., appearing pro se, had about a week to prepare for the February 17 hearing. This fact is important because Appellant Ellis appeared to be the only one among the petitioners who had factual knowledge of the arrangement. At least, Appellant Ellis was the only petitioner who bothered to testify at the hearing to explain and support the arrangement (See Transcript). Yet, Ellis and the counsel for petitioners except William S. Ellis, Jr., who had been served with Appellees' memorandum of authorities



in support of their motion to dismiss, knew that the hearing would involve questions going to the propriety and feasibility of the arrangement. Since \$717,000 worth of real property was at stake (R. 23), the lack of any testimony supporting the arrangement by any petitioner other than Ellis indicates that the other petitioners may not have had as comprehensive knowledge about the arrangement as Ellis.

The meager knowledge of the arrangement on the part of the other petitioners was further evidenced at the hearing (Transcript, p. 11-12):

The Court: "Before I do anything else, Mr. Tamura, you said that you had not had as much time as you desired, and you joined Mr. Ellis in the motion for continuance. What have you to say on the matter of the motion to dismiss at this time?"

Mr. Tamura: "On the matter of the motion to dismiss?"

The Court: "Yes"

Mr. Tamura: "On the points raised in the memorandum, your honor?"

The Court: "Yes. The key point that you recognize is that the debtor posed real property arrangements not proposed in good faith in that the complaint provides



no adequate means of the execution of the arrangement."

Mr. Tamura: "I had a short conversation with Mr. Ellis prior to the hearing this afternoon and I asked him the specific question, How does he propose to effectuate the execution or that some way there is a dissolution of the property now that it is before the Bankruptcy Court? And he informed me--and I believed him--that in his proposed arrangement--" (Emphasis Added)

The Court: "Well, if you are going on his hearsay, let's get it out of Mr. Ellis himself."

Mr. Tamura: "That is the only thing I have."

Obviously, if the other petitioners had a firm knowledge of the arrangement, Counsel for petitioners except William S. Ellis, Jr. would have approached them, not Ellis. However, based on the foregoing statements, particularly the emphasized phrase, Ellis seems to be the mastermind of the arrangement.

Consider the following facts: (1) Ellis knew more about the arrangement than any other petitioner; (2) the February 17 hearing dealt solely with factual questions concerning the arrangement; and (3) Ellis had received more than a five-day notice prior to the hearing. Under these circumstances, Appellants were duly served with Appellees'



motion and notice of the hearing. The facts clearly show that even if counsel for petitioners except William S. Ellis, Jr. had had the full five-day notice instead of only four, the evidence presented at the hearing would not have varied significantly. Hence, under Herron v. Herron, supra, the Appellants herein had had actual notice and time to prepare to meet the questions raised by Appellees' motion.

Finally, Appellants were afforded the opportunity to be heard and defend in an orderly proceeding at the February 17 hearing (See Transcript). The court appeared very solicitous of the Appellants because instead of dealing with the technical substantive issue regarding the ownership of real property by partnerships, it went into the merits of the arrangement with which the Appellants should have been very familiar. Furthermore, all the court requested of the Appellants in order to grant their motion to continue the hearing on Appellees' motion to dismiss was prima facie evidence of the reasonableness of the arrangement and of the necessity of a continuance (Transcript, p. 12-13).

Pursuant to its request to Appellants, the court permitted Appellant Ellis to testify extensively. Throughout said testimony, the court was in control of the proceedings and kept the questions from the various counsel present at





the hearing as pertinent as possible. However, the court found that Appellants' arrangement was not even slightly meritorious and had to deny Appellants' motion to continue and to grant Appellees' motion to dismiss (Transcript, p. 50-52).



F. The District Court did not Abuse  
Its Discretion in Denying Con-  
tinuance of the Hearing.

As already noted, supra, the decision of the court in denying Appellants' motion to continue the hearing was based on its finding that a continuance would be unnecessary because the arrangement itself was not in the creditors' best interests.

Appellant Ellis, the only petitioner to testify at the hearing and the mastermind of the arrangement, was given every opportunity to show that the arrangement was meritorious. He was not required to submit conclusive proof or even a preponderance of evidence at the hearing that the arrangement could be executed. All the court wanted was prima facie evidence (Transcript, p. 12-13), and the Appellants failed to meet this reasonable requirement.

Appellants claim that if the motion for a continuance was granted, the only prejudice to Appellees would be the loss of one of the counsel's time and plane fare from Maui to Honolulu (Opening Brief, p. 31). However, counsel for J-R-M Corporation and Myra Deane Charlton correctly showed that the injury to the Appellees would be substantially more serious. In the case of J-R-M Corporation and Myra Deane Charlton, Appellants had defaulted on a mortgage arrangement in 1961



and they had not paid "a dime" to the mortgagees since then (Transcript, p. 6). This substantial monetary injury is equally applicable to Appellees Fusao and Kimiyo Yumen because Appellant Ellis admitted that they had not been paid any more than J-R-M Corporation and Myra Dean Charlton (Transcript, p. 10). There has also been considerable monetary injury to all creditors whose pending suits (R. 11-12) were stayed by the petition for a real property arrangement. Further continuance of an unfair arrangement would serve to increase the monetary losses to Appellees herein and all other creditors.

Finally, Appellants assert that their affidavits at R. 144-150 clearly prove that they did not have enough time to prepare for the hearing (Opening Brief, p. 31). This issue was disposed of in the previous section on due process where it was shown that the only question that was discussed at the hearing was the feasibility of the arrangement. This is a factual question, not a legal one, which should have been uppermost in Appellants' mind when they drafted the arrangement and submitted it. Additional preparation would not seem necessary to meet the objections posed by Appellees.

On the other hand, if additional preparation was necessary, it would appear that the Appellants must have drafted





the arrangement in a hurry without considering whether or not it contained the means for its execution. It would also appear that Appellant Ellis had been negligent in not making time to prepare for the February 17 hearing on his arrangement since he had time to appear in another case in which he was only remotely connected one day before the hearing (Transcript, p. 13-15).

Under these circumstances, Appellants would have submitted the arrangement solely as a delaying tactic and not in good faith as required by Sec. 472(4). This situation would be reminiscent of In Re Tinkoff (C.A. 2, 1936), 85 F.2d 305, in which the Second Circuit Court of Appeals found the debtor's arrangement not to be in good faith because, inter alia, her arrangement was "begun and maintained to hinder and delay her creditors". Ibid., p. 309.

From the foregoing facts, the district court acted within the scope of its discretionary authority. Faced with substantial injury to the creditors on the one hand, and a real property arrangement without adequate means for its execution on the other, the court was obligated to deny Appellants' motion to continue and grant Appellees' motion to dismiss.



#### IV. CONCLUSION

Appellants herein did not file a petition to be adjudged a bankrupt within the terms of Chapter 1 to 7. Such action would result in the liquidation of their estate.

Rather, Appellants filed a petition for a real property arrangement as provided by Chapter XII of the Bankruptcy Act. In this way, Appellants could retain possession of the real property which were being taken away or under threat of being taken away by mortgagees and legal owners of the property.

However, Appellants' arrangement was found to be badly defective under the provisions of Chapter XII. It did not meet the requirements of Sec. 468 (acceptance by creditors), Sec. 461(11) (adequate protection of non-consenting creditors), and Sec. 472 (confirmation by the district court). Furthermore, there were issues relating to jurisdiction and fraud involved in the arrangement. These gross defects indicate that the arrangement had been hastily put together, possibly for the sole purpose of delaying Appellants' secured creditors from obtaining relief in the state courts.

The defects of the arrangement are determinations that have been shown to be adequately substantiated by the



facts of this case. As factual determinations, they should not be disturbed, "unless clearly wrong". Wayne United Gas Co. v. Owens-Illinois Glass Co. (C.A. 4, 1937), 91 F.2d 827, 831. See also the cases cited therein and those on pp. 3-4, supra, supporting this proposition.

The procedural objections made by Appellants must also be overruled because under the facts of the case they received adequate notice of the hearing and of the issues to be discussed at the hearing. They were given full opportunity to set forth the merits of their arrangement.

In the final analysis, this Court is faced with debtors who have attempted to use the Bankruptcy Act to benefit themselves at the expense of their creditors. They want to hold on to the real property, but do not want to provide any consideration to their creditors for this speculative venture. The equitable principles governing a bankruptcy court found that the arrangement was unmeritorious, and Appellees respectfully request that this Court affirm the decision of the lower court.

DATED: Wailuku, Maui, Hawaii, this 14th day of September, 1968.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was served this  
date upon counsel of record by mailing same, properly ad-  
dressed and postage prepaid.

DATED: Wailuku, Maui, Hawaii, September 14, 1968.

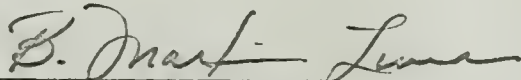
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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B. Martin Luna



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In the  
**United States Court of Appeals**

**For the Ninth Circuit**

**No. 22088** ✓

**INDIANA GENERAL CORPORATION,**

**A CORPORATION,**

*Plaintiff-Appellant,*

*vs.*

**LOCKHEED AIRCRAFT CORPORATION,**

**A CORPORATION,**

*Defendant-Appellee.*

**BRIEF FOR PLAINTIFF-APPELLANT.**

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**FILED**

**DEC 21 1967**

**B. LUCK, CLERK**

**DEC 27 1967**



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INDIANA GENERAL CORPORATION,  
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LOCKHEED AIRCRAFT CORPORATION,  
A CORPORATION,  
*Defendant-Appellee.*

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**BRIEF FOR PLAINTIFF-APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

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Plaintiff, Indiana General Corporation, filed a complaint in the United States District Court for the Central Division of California against the Defendant, Lockheed Aircraft Corporation, alleging infringement by the Defendant of United States Letters Patent No. 2,981,689. (R. 2-9.) Jurisdiction is based on the Patent Laws of the United States and 28 U. S. C. 1291, 1338(a) and 1400(b). Defendant's Motion for Summary Judgment was filed January 16, 1964. (R. 276.) Defendant's Motion for Summary Judgment was granted by a Memorandum Decision dated January 12, 1966

(R. 532) and entered on January 26, 1966. (R. 558.) Plaintiff's Motion for Reconsideration was filed February 21, 1966 (R. 584) and the Order Denying Plaintiff's Motion for Reconsideration was filed April 24, 1967. (R. 769.) Plaintiff's Notice of Appeal was filed May 22, 1967. (R. 775.)

STATEMENT OF THE CASE.

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**Introduction.**

Stated very briefly, this case presents the question of whether or not a sale in 1949 of a material, known under the trade name Ferramic A-34, would anticipate the patent in suit where the patent in suit is a continuation-in-part of a parent application filed in 1948, and where that patent application specifically disclosed the compound Ferramic A-34. Stated another way, does the sale of the compound Ferramic A-34 in the year *following* the date of the first application disclosing that specific compound, invalidate a patent issued on a subsequently filed patent application which is based upon the 1948 parent application? The specific chronology is as follows:

1. On December 28, 1948, Dr. E. Albers-Schoenberg filed an application for United States Letters Patent on a ferromagnetic ceramic material having a composition which included manganese, magnesium and iron oxides. (R. 886-895.) The application stated that the manganese-magnesium ferrite products of the invention could be magnetized, had high resistivity, and possessed dielectric and insulating properties. (R. 888-89.) The application set forth several specific examples of the manganese-magnesium ferrite material, including Example 3. (R. 892.) Example 3 is the specific formula for a manganese-magnesium ferrite material which later became known by the trade name Ferramic A-34 or A-34. (Finding 26, R. 788.)

2. On May 10, 1949 magnetizable core bodies of Ferramic A-34 were first manufactured and sold commercially by Plaintiff's predecessor. (R. 277, Finding 20, R. 787.)

3. In December of 1949, Plaintiff's predecessor caused to be published in the trade magazine ELECTRICAL MANUFACTURING, an article which included a number of photographs of oscillograms showing hysteresis loops of a number of magnetizable manganese-magnesium ferrites, one of which was the hysteresis loop of Ferramic A-34. (R. 275, Finding 21, R. 787.) It is conceded that the composition of ingredients of Ferramic A-34 was not specified in the article. (R. 473.) It should be pointed out that all magnetizable materials, when magnetized, possess a hysteresis loop as an inherent characteristic. The hysteresis loop of Ferramic A-34 shown in this publication was substantially square in shape. The shape of any hysteresis loop can be determined by simply observing an oscillograph trace.

4. Some time in the summer of 1950, one W. N. Papian of Massachusetts Institute of Technology requested and was supplied by Plaintiff's predecessor with cores of Ferramic A-34 for use in conjunction with an electronic circuit he was developing. (R. 186.) The results of Mr. Papian's experiments were incorporated in a thesis entitled "A Coincident-Current Magnetic Memory Unit" dated August 31, 1950. (R. 312.) On or about October 9, 1950, Mr. Papian's thesis was filed in the M. I. T. library. (R. 310.) There is no record available to show how long the processing of the thesis took before it became available to the public, but the present librarian of the M. I. T. library stated that a thesis so filed would normally be available to the public within a week or ten days after being filed. (R. 310.) It is conceded that the Papian thesis did not disclose the chemical composition nor the ingredient proportions of Ferramic A-34. (R. 473.)

5. On October 30, 1951, Dr. E. Albers-Schoenberg filed a second application in the United States Patent Office, Serial No. 253,779. (R. 234-44.) This application was stated to be a continuation-in-part of the parent application Serial

No. 67,752 filed December 28, 1948. (R. 236.) Application Serial No. 253,779 disclosed a modified range of ingredients of manganese-magnesium ferrites and included as Example 1 the specific formulation of Ferramic A-34. (R. 237, 239, Finding 26, R. 788.) This second application pointed out a further property of manganese-magnesium ferrites, namely, that certain of these materials possess a square hysteresis loop when magnetized. (R. 236-37.) Ferramic A-34 was one of these and the square hysteresis loop property is inherent in that material. (R. 456.)

6. On February 7, 1952, Dr. E. Albers-Schoenberg filed a third patent application in the United States Patent Office, Serial No. 270,351. (R. 925-43.) This application further modified the range of ingredients of manganese-magnesium ferrites, which range, however, included Ferramic A-34. (R. 932, Finding 30, R. 789.)

7. On July 12, 1954, Dr. E. Albers-Schoenberg filed application Serial No. 442,534, narrowing somewhat the range of ingredients of Serial No. 270,351, but still including Ferramic A-34. (R. 796-817.) This application matured into the patent in suit. (R. 5-9.) The application states on its face that it is a continuation-in-part of application Serial No. 270,351, which in turn is a continuation-in-part of application Serial No. 253,779, which itself is a continuation-in-part of application Serial No. 67,752 filed December 28, 1948. (R. 801.)

As a procedural matter, the Plaintiff caused the first three applications to become abandoned, which abandonment did not abandon the invention which was carried into the fourth application and thence into the patent in suit.

Claim 3 of the parent application Serial No. 67,752 filed December 28, 1948, read on Ferramic A-34, and claims 1 and 3 of the patent in suit also read on Ferramic A-34. (Finding 19, R. 787.) The composition Ferramic A-34 was

continuously presented to the Patent Office from December 28, 1948 to the date of issuance of the patent in suit. (Finding 30, R. 789.)

The 1948 application did not disclose the fact that Ferramic A-34 inherently possessed a square hysteresis loop. The second, third, and fourth applications pointed out this characteristic of the manganese-magnesium ferrite material. The fact that this material possessed a hysteresis loop which was square, enlarged substantially the field of use of the material, particularly as memory cores in a computer. The decision of the court below was based upon the conclusion that the patent in suit was entitled only to the filing date of the second-filed application (Item 5 above), Serial No. 253,779, the first application to disclose that manganese-magnesium ferrite materials, including Ferramic A-34, possessed a square hysteresis loop; and that therefore the sale of Ferramic A-34 in May of 1949 (Item 2 above), the publication in ELECTRICAL MANUFACTURING in December of 1949 of the square hysteresis loop properties of Ferramic A-34 (Item 3 above), and the Papian thesis of 1950 which referred to properties of Ferramic A-34 (Item 4 above), presented statutory bars to the validity of the patent and warranted the granting of Summary Judgment of invalidity.

The primary question presented on this appeal is whether or not the patent in suit is entitled to the filing date of the earliest filed application disclosing **subject matter common to both**. Stated another way, where a patent application filed in 1948 specifically disclosed Ferramic A-34 as a manganese-magnesium ferrite possessing important and valuable properties, would the subsequent sale of that specific Ferramic A-34 material in 1949 and the disclosure of the inherent square loop properties thereof in a publication in 1949 and in a thesis in 1950, invalidate the patent which



covers Ferramic A-34, particularly where the composition Ferramic A-34 was continuously presented to the Patent Office from 1948 to the issue of the patent in suit?

The court below held that claims 1 and 3 of the patent in suit which cover the Ferramic A-34 material were invalid because of the sale and publications in 1949 and 1950 referred to above, and furthermore, that claims 2 and 4 of the patent in suit which do not cover Ferramic A-34 were invalid as differing only in degree from claims 1 and 3. (Conclusion 10, R. 791.) Thus, a further question presented to this court is the error of the trial court's ruling granting summary judgment of invalidity as to claims 2 and 4 of the patent in suit.



SPECIFICATION OF ERRORS RELIED UPON.

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1. The Court erred in finding that the sale of a manganese-magnesium ferrite material, namely Ferramic A-3 in 1949, invalidates the patent in suit which is a continuation-in-part of a parent application filed in 1948, where the specific manganese-magnesium ferrite material sold was disclosed and claimed in said 1948 application. (Finding 2 R. 787; Conclusion 5, R. 790.)

2. The Court erred in finding that claims 1 and 3 of the patent in suit, which claims cover a manganese-magnesium ferrite material given the trade name Ferramic A-34 to Plaintiff, are invalid because of a sale by Plaintiff in 1949 of Ferramic A-34, where the specific formula of Ferramic A-34 was disclosed in a parent application filed in 1948, and where Ferramic A-34 was Example 3 of that parent application in spite of the fact that there was no hiatus in the dependency of applications from the 1948 application to the continuation-in-part application which resulted in the patent in suit, and where the Court specifically found that the composition Ferramic A-34 was continuously presented to the Patent Office during the entire period. (Finding 3 R. 789.)

3. The Court erred in finding that the portion of a publication published in December 1949 which disclosed the square hysteresis loop properties of Ferramic A-34 invalidates the patent in suit which is based on a parent application which first disclosed Ferramic A-34 in December 1948. (Finding 21, R. 787.)

4. The Court erred in finding that the Papien thesis became a "publication" before October 30th, 1950, and when becoming a publication disclosing the square loop

properties of Ferramic A-34 invalidated the patent in suit which covers Ferramic A-34. (Finding 23, R. 787; Finding 24, R. 788; Conclusions 7, 8, R. 791.)

5. The Court erred in failing to find that the patent in suit was entitled to an effective filing date of December 28, 1948, the date of filing of the parent application from which the patent in suit evolved.

6. The Court erred in finding that the patent in suit was entitled to an effective filing date of October 30, 1951, the filing date of application Serial No. 253,779, and not to the filing date of December 28, 1948, the filing date of application Serial No. 67,752. (Finding 6, R. 782; Finding 24, R. 789.)

7. Inasmuch as neither the ELECTRICAL MANUFACTURING publication in 1949, nor the Papian thesis of 1950, disclosed the chemical composition or ingredient proportions of Ferramic A-34, the Court erred in finding such to be "publications" within the meaning of the statute, particularly in view of the fact that there is nothing in the record to indicate that anyone outside of Plaintiff ever analyzed Ferramic A-34. (Findings 21, 24, 25, 27, R. 787-788.)

8. The Court erred in holding that the filing date of the parent application Serial No. 67,752, which application specifically discloses a manganese-magnesium ferrite material and enumerates its then known properties, cannot be relied upon in the continuation-in-part application Serial No. 253,779 subsequently filed during the pendency of the parent application, which continuation-in-part application discloses the same manganese-magnesium ferrite material, because the continuation-in-part application also discloses a newly found but inherent property of such material.

9. The Court erred in finding that even though the claims of the patent in suit and the claims of the parent application upon which Plaintiff asserts the patent in suit

is entitled to rely both cover the same manganese-magnesium ferrite material, the essence of the invention was the recitation of inherent properties of the material and therefore the claims must be considered as drawn to different inventions. (Finding 13, R. 784.)

10. The Court erred in finding that since the 1948 application Serial No. 67,752 did not disclose the square hysteresis loop properties of the manganese-magnesium ferrite material therein disclosed, nor the use thereof in a computer, the patent in suit is not entitled to the filing date of such application. (Finding 34, R. 789.)

11. The Court erred in making findings covering disputed issues of fact in a Summary Judgment proceedings such as, what constitutes the "new" discovery of a patent without evidence concerning what was old, *i.e.*, the prior art. (Findings 13, 14, 17, R. 784-786.)

12. The Court erred in holding claims 2 and 4 of the patent invalid by virtue of the sale of a ferrite material whose proportions of ingredients are outside of the proportions found in claims 2 and 4.

13. The Court erred in concluding, without the benefit of evidence, that the ferrite materials described in claims 2 and 4 of the patent in suit differ only in degree from the ferrite materials described in claims 1 and 3. (Conclusion 10, R. 791.)

14. The Court erred in finding that the "new and useful" thing disclosed in the patent in suit is the discovery that manganese-magnesium ferrites have the property of a square hysteresis loop if compounded within certain proportions. (Finding 14, R. 785.)

15. The Court erred in failing to find that the "new and useful" thing disclosed in application Serial No. 67,752 (and in all of the applications that followed) was a composition of matter, *i.e.*, a group of manganese-magnesium fer-

rites whose ingredients were within a specified range of proportions, such new and useful composition of matter possessing useful properties.

16. The Court erred in concluding that the invention of the patent in suit was the inherent property of a specific composition of manganese-magnesium ferrite material where the claims are directed to the particular proportions of manganese-magnesium ferrite materials which inherently possess such properties. (Conclusion 2, R. 790.)

17. The Court erred in failing to find that the invention of the patent in suit was specific compositions of manganese-magnesium ferrite materials, which compositions were disclosed in the parent application filed in 1948.

18. The Court erred in granting summary judgment particularly in view of the existence of disputed questions of fact upon which evidence should be received.

19. The Court erred in basing its decision on the premise that the "heart of Plaintiff's invention" was the discovery of a "hysteresis loop which becomes square or rectangular when magnetized". (R. 537.)

20. The Court erred in concluding that the first application, Serial No. 67,752, did not disclose the invention of the patent in suit, in spite of Defendant's concessions that the manganese-magnesium ferrite material Ferramic A-34, specifically disclosed as Example 3 in application Serial No. 67,752, inherently possesses square loop properties (R. 456), and Defendant's further concession that "making and disclosing a ferrite product which produces a square loop hysteresis would constitute invention for the purposes of this motion." (R. 543.)

## ARGUMENT OF THE CASE.

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### Summary.

The validity of claims 1 and 3 of the patent in suit depend primarily on whether or not the sale of Ferramic A-34, the ELECTRICAL MANUFACTURING publication and the Papiian thesis in the years following the filing date of the application first disclosing Ferramic A-34, can be considered as anticipating the patent in suit which is a continuation-in-part of the parent application filed in 1948. If the invention was the discovery of a new manganese-magnesium ferrite material, that material was discovered by 1948 and the subsequent sales and publications have no effect on the validity of the patent in suit. If the invention was the discovery that the specific manganese-magnesium ferrite material possessed an additional but inherent property which rendered it useful in additional areas, that fact was not presented in an application to the Patent Office until more than one year after the date of sale of the Ferramic A-34 material. Stated in its simplest terms, if Dr. Albers-Schoenberg's invention was a new composition of matter, the 1948 filing date is applicable and the patent in suit is valid; if Dr. Schoenberg's invention was the discovery of a new use for the composition of matter disclosed in his 1948 application, that new use did not appear in a patent application until more than one year after the first sale of the composition.

Claims 2 and 4 of the patent in suit cover manganese-magnesium ferrites of a composition different than Ferramic A-34, different from anything disclosed in the 1948 application, and their validity depends upon whether or



not the trial court was correct in concluding that they differ only in degree from claims 1 and 3.

The undisputed fact is that the Ferramic A-34 material, the sale and disclosure of which was held to invalidate the patent in suit, was specifically disclosed in the application filed in 1948. That application disclosed manganese-magnesium ferrite materials, described how to make them, and set forth the uses to which the material could be put, all in conformity with 35 U. S. C. 112. The invention is a composition of matter, namely, a new manganese-magnesium ferrite material possessing useful properties. The fact that subsequently an additional useful property was discovered should in no way deprive the Plaintiff from the first effective filing date.

It would appear that the trial court's decision to grant Summary Judgment was based on the erroneous premise that the invention was not the discovery of a particular manganese-magnesium ferrite material which possesses valuable and useful properties, but rather that the invention was the discovery of a property of the material. In other words, the Court below held, conceding that the material Ferramic A-34 was the same from the 1948 application to the patent in suit and is covered by the claims of both, that the discovery of the inherent square hysteresis loop properties possessed by Ferramic A-34 constituted the invention of the patent in suit rather than the discovery of the Ferramic A-34 material itself.

The patent laws simply do not provide for the issuance of a patent upon the discovery of a property, nor do the patent laws provide for the issuance of a new patent on an old composition of matter because of the discovery of a new use for the composition. Only the composition itself may be patented and then only if the composition is new. Thus, Section 101 of 35 U. S. C. reads as follows:

### SEC. 101. *Inventions patentable*

Whoever invents or discovers any new and useful process, machine, manufacture, or **composition of matter**, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

The controlling authorities disagree with the position taken by the court below. Under the authorities, it is the composition of matter itself which may be patented and once having been patented, a second patent cannot issue covering a different use of the composition. The essence of the invention being the composition itself, the sale of the composition subsequent to the filing date of an application disclosing the same does not constitute a bar. This being the law, the sale of Ferramic A-34 in 1949 cannot invalidate the patent in suit based on an application filed in 1948.<sup>(1)</sup>

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(1) It should be noted that the sale of the Ferramic A-34 material in 1949, which was held to invalidate the patent in suit, was a sale for uses disclosed in the 1948 application, *i.e.*, delay lines, transformer cores, tuning slugs and cores for oscillator coils, sometimes in the form of Toroids. (R. 447, 277). The sale was not for uses of the material arising out of the inherent square hysteresis loop characteristic of Ferramic A-34, and it is not known whether the purchasers even knew that the material possessed such a characteristic. If the court below was correct in that the invention was the "new use", clearly the 1949 sale would not invalidate the patent in suit as the sale was not for such use. It is Plaintiff's position, however, that the invention was the discovery of a new composition of matter possessing valuable properties. This discovery was disclosed in a patent application in 1948. On this premise, the sale in 1949 of the Ferramic A-34 material would invalidate the patent in suit if the first application disclosing that composition were filed more than one year after the date of such sale. The fact is, of course, that the 1948 application specifically disclosed the Ferramic A-34 material and hence the sale in 1949 is of no consequence.



## ARGUMENT.

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### THE APPLICATIONS LEADING TO THE PATENT IN SUIT.

The first application, Serial No. 67,752, was filed on December 28, 1948. This application complies fully with the patent laws as regards disclosure, and more particularly the requirements of 35 U. S. C. 112. Thus, the application contains a written description of a manganese-magnesium ferrite material having dielectric properties, high resistivity, and high insulating properties. (R. 889-90.) The application includes the process of making the product by grinding the ingredients in specified proportions and molding and firing the mix at specified temperatures. (R. 891-92.) Three specific examples of manganese-magnesium ferrites are set forth including specific ingredient proportions, process of preparing the raw materials (grinding, molding and firing at a specified temperature), and reporting the electrical and magnetic characteristics of the resulting manganese-magnesium ferrites. (R. 891-92.) Example 3 of the application is the material identified as Ferramic A-34, Ferramic A, or A-34. (R. 475, 544.) The description includes the best mode then known of making and using the manganese-magnesium ferrite material. The description includes the suggested uses for the resulting manganese-magnesium ferrite material as magnetic core bodies for inductances in electrical circuits or for use wherever the material contacts conducting parts of a circuit. (R. 888.) Magnetic cores are used in computers and conducting parts (wires) of the computer circuit pass through the core, which conducting parts contact the magnetic core, all as suggested in this application Serial No. 67,752. Thus, when the need for magnetic materials

possessing insulating properties and being capable of being in contact with electrical conductors arose in the construction of computers, the material of the 1948 application was ready and waiting to supply such need.

The second application, Serial No. 253,779, was filed October 30, 1951, while the first application was still pending. (R. 234.) Example 1 of this application is the specific formula for Ferramic A-34. (R. 239, 475-76.) This application set forth an additional property of the manganese-magnesium ferrite material, namely, that such materials (including Ferramic A-34) when magnetized possess a hysteresis loop which is substantially square. (R. 239-40.)

The third application, Serial No. 270,351, was filed February 7, 1952, while the first two applications were still pending and hence there was no hiatus in the pendency of applications before the Patent Office. (R. 475-76.) This application also disclosed manganese-magnesium ferrite materials but enlarged somewhat the range of proportions of the ingredients over the range set forth in application Serial No. 253,779. (R. 6; 475-76; 932-37.)

The fourth application, which resulted in the patent in suit, was filed on July 12, 1954. (R. 796-817.) The second and third applications were still pending at this time, while the first application had been abandoned. All of the first three applications, of course, were abandoned before the patent in suit issued. The abandonment of the applications, of course, does not constitute an abandonment of the invention disclosed therein. This fourth application, which resulted in the patent in suit, narrowed slightly the range of ingredient proportions of application 270,351. The range of the patent in suit includes Ferramic A-34. (Finding 19, R. 787.)

Summarizing the history, the first application contained a full disclosure of the composition of Ferramic A-34 as one ferrite among several within a specified range of man-

ganese-magnesium ferrites. The second application continued and carried forward the specific Ferramic A-34 ferrite material. There was also disclosed in the second application certain manganese-magnesium ferrites whose compositions were outside the range of the 1948 application. The range of the second application included Ferramic A-34. In effect, the family of ferrites in the second application was such that it included Ferramic A-34 in the family.

The third application was filed in order to expand slightly the range of the manganese-magnesium ferrites of the immediately previous application. The expanded range still included Ferramic A-34 as well as all of the range of the second application. The fourth application merely narrowed somewhat the range of the manganese-magnesium ferrites of the third application but still included Ferramic A-34.

**In the Light of the Foregoing History, the Patent in Suit Is Entitled to an Effective Filing Date of December 28, 1948.**

Under the law, the foregoing facts clearly establish Plaintiff's right to rely on the December 1948 filing date insofar as the patent in suit is concerned to the extent that the subject matter of the 1948 application and the patent in suit are common. It was found by the trial court that the composition Ferramic A-34 was continuously presented to the Patent Office from December 28, 1948 to the date of issue of the patent in suit. (Finding 30, R. 789.) Thus, the disclosure of the patent in suit, at least insofar as it relates to and covers Ferramic A-34, is common with the subject matter of the disclosure of the 1948 application.

The law is clear that a continuation-in-part application is entitled to the filing date of the parent application to the extent of subject matter common to both. Thus, in the case

of *Asseff v. Marzall*, 189 F. 2d 660 (C. A. D. C. 1951), the court stated, at page 661:

“But the Cook patent purports on its face to be a ‘continuation-in-part’ of a prior application filed July 11, 1941. As to all subject matter carried over into the continuing application from the parent application, the former is entitled to the filing date of the latter. *Hunt Co. v. Mallinckrodt Chemical Works*, D. C. E. D. N. Y. 1947, 72 F. Supp. 865. The question is, then, what matter, if any, was carried over into the later application?”

It is conceded (R. 476) that the manganese-magnesium ferrite material Ferramic A-34 was continuously presented to the Patent Office from 1948 to the date of issuance of the patent in suit, and the court so found. (Finding 30, R. 789.) Thus Ferramic A-34 was “matter carried over into the later application”.

The *Asseff v. Marzall* case was quoted with approval in the case of *Goodyear Tire and Rubber Co. v. Ladd*, 349 F. 2d 710 (C. A. D. C. 1965) where the court stated, at page 711:

“Though appellants now contest this, we have already held that, ‘(a)s to all subject matter carried over into the continuing application from the parent application, the former is entitled to the filing date of the latter.’ *Asseff v. Marzall*, 88 U. S. App. D. C. 358, 359, 189 F. 2d 660, 661, cert. denied, 342 U. S. 828, 72 S. Ct. 51, 96 L. Ed. 626 (1951).”

See also *Ransburg Electro-Coating Corporation v. Proctor Electric Company, Inc.*, 203 F. Supp. 235 (D. C. Md. 1962), at pp. 246-47; and *Noradel Process Corporation v. J. P. Meyer & Co., Inc.*, 35 F. 2d 697 (C. A. 2), at p. 701.

The patent statutes also clearly set forth Plaintiff's rights. 35 U. S. C. 120 provides as follows:



SEC. 120. *Benefit of earlier filing date in the United States.*

An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application.

The 1948 application complies with each of the requirements of the first paragraph of section 112, which reads as follows:

SEC. 112. *Specification.*

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The 1948 application disclosed an invention in the manner provided by section 112. As hereinbefore pointed out, the invention was described, the manner and process of making and using it were described in terms such as to enable one skilled in the art to practice it, and the application also set forth the best modes contemplated by the inventor for carrying out his invention. The patent in suit refers in sequence to the preceding applications, as required by the last portion of section 120, and it should be noted that the Patent Office made no objection to the reci-

tation of preceding applications back to the 1948 application, nor did the Patent Office question the patentee's right to relate the patent in suit back to the first filed application.

One of the premises for the trial court's position in denying the Plaintiff the benefit of the 1948 filing date insofar as Ferramic A-34 is concerned, is expressed in Finding 34, which reads as follows:

"34. Since application Serial No. 67,752 did not disclose the square hysteresis loop properties of the magnesium-manganese ferrite material therein disclosed nor the use thereof in a computer, the patent in suit is not entitled to the filing date of such application." (R. 789.)

The court did find (Finding 11, R. 784), and the Defendant conceded (R. 456), that the manganese-magnesium ferrite materials of the 1948 application possessed other useful properties. The court also found (Finding 26, R. 788), and the Defendant also so conceded (R. 456), that the Ferramic A-34 disclosed in the 1948 application inherently possessed a hysteresis loop that was square.

The court, however, is clearly in error in basing its decision that the patent in suit cannot be given the benefit of the 1948 filing date, at least insofar as Ferramic A-34 is concerned, on the premise that the same use must be disclosed before the date can be related back.

The fact that the inventor of a specific compound subsequently discloses an additional property possessed by the compound and files a continuation-in-part application which discloses the additional property, does not deprive the inventor of the filing date of the first application disclosing the compound. This issue was squarely presented to the Court of Customs and Patent Appeals in the case of the *Application of Kirchner*, 305 F. 2d 897 (1962). In that case Kirchner had compounded a certain chemical composition and had filed an application for patent disclosing

the compound, attributing to it certain therapeutic properties. At a later date, Kirchner filed a continuation-in-part application of his first filed application disclosing the same compound but attributing to it a different therapeutic property. Between the dates of the Kirchner first filed application and his continuation-in-part application, there was a publication of an article disclosing the compound. The publication occurred at a date more than a year prior to Kirchner's filing of his continuation-in-part application. The question was whether Kirchner was entitled to rely upon the filing date of his first filed patent application and thus avoid the statutory bar of the publication. Kirchner was one of the co-authors of the article (just as Dr. Albers-Schoenberg the inventor here, is one of the co-authors of the article in *ELECTRICAL MANUFACTURING* of December 1949). (R. 271.)

The Patent Office position was that Kirchner was not entitled to his earliest filed application date for the reason that the statement of the therapeutic properties of the compound in the continuation-in-part application was not to be found in the first filed application, which actually asserted different therapeutic properties. Admittedly, the compound described in both the first filed and continuation-in-part applications was the same.

Speaking through Judge Rich, the Court of Customs and Patent Appeals held that the mere fact that Kirchner suggested a new and even different property or use for his invention would not prevent his being able to rely on the filing date of the first filed application disclosing the compound, the Court stating at page 902:

"This new position adopted by the board was that the disclosure in the parent case contained 'deficiencies' in that it failed to disclose that the claimed compounds 'may function both as curarimimetic agents and as anticholinesterase or curare-antagonizing agents depending upon whether they are used in large or in



minute dosages.' Or, to adopt other language from its opinion denying reconsideration, it held that appellant 'could not rely on' the parent case because it did not disclose 'the utility asserted in the instant application.' (Emphasis ours.)"

In recognizing Kirchner's right to rely on the early filing date the court went on to say, pages 903-904:

"Always lurking in the background of the argument of the Patent Office is an echo of a theory which was initially propounded by the examiner but never really pursued before us, namely, that 'the invention' in the case of a new chemical compound is not the compound itself (as a 'composition of matter' within the contemplation of section 101, 35 U. S. C.), but is a compound *coupled with* a disclosed use. This interesting metaphysical concept led the examiner to take the position that a disclosure of compound X having anticholinesterase activity is a disclosure of a *different* 'invention' than compound X with curarimimetic activity even though *the claims* are directed to compounds per se without a use. This was the reasoning of the *Scudi* case, cited by the board, and was urged by Coan in the *Biel v. Coan* case. We think the Board of Interference Examiners gave a very good answer in the latter case when it said:

'Coan's view is untenable and if adopted could lead to extraordinary results. Thus, the same compound could be repatented as often as a new use could be found, merely on the ground that the invention was different and even an infringer of a patented compound could escape by the same route.'

"What might be termed the examiner's 'complete invention theory' in chemical cases, confuses, it seems to us, the invention itself which is the subject matter claimed—in cases of this type the new chemical compound—with one of the factors which is taken into consideration in determining whether the invention is or is not *patentable* from the standpoint of meeting

35 U. S. C. Sec. 103. As was said in *Biel v. Coan*, where the claim contains no 'use' limitation, '**we know of no authority, theory or reason**' for requiring that a parent case disclose the same utility as a later application to entitle the latter to the benefit of the filing date of the parent.'" (Emphasis added.)

The *Kirchner* case is directly on the point involved in the present litigation. Actually, the facts in the *Kirchner* case go somewhat beyond the facts in the present case. The properties of manganese-magnesium ferrites expressed in the patent in suit are not only the square hysteresis loop, but also the high resistivity and high insulating properties. The high resistivity and insulating properties of the material was also pointed out in the parent application filed in 1948. In the *Kirchner* case the property and use pointed out was totally new and the property and use expressed in the first application was dropped from the second. Even so, the court held that the applicant was entitled to the filing date of the first filed application.

The claims in suit clearly have no "use" limitation. The phrase in the claims "having a substantially square hysteresis loop" is a statement of a property not a statement of a use and the Court of Customs and Patent Appeals in an interference involving the application which became the patent in suit specifically so found. Thus, in *Hegyi v. Albers-Schoenberg*, 280 F. 2d 859, in discussing a claim containing the above phrase, the Court stated, at page 862:

"Here the count is for a ferrite body having a substantially square hysteresis loop and being composed of ingredients falling within prescribed ranges. It is not limited to use in a magnetic memory of the coincidence current type, or in a magnetic switch or even as a magnetic core. No particular use or operative connections are required. It is a broad count drawn to an article."

While the 1948 application did not disclose the fact that the manganese-magnesium ferrites therein described possessed square loop properties, the application very specifically pointed out that they possessed other useful properties including high resistivity. (R. 890.) The court found that they did in fact possess such high resistivity and this would presumably lead persons skilled in the computer art to use the materials of the 1948 application as memory cores in computers. The trial court found in Finding 11:

"11. Certain magnesium-manganese ferrites whose ingredient proportions are disclosed in the patent in suit and in said application Serial No. 67,752 inherently have high resistivity as compared to metals, i.e., they are very poor conductors of electricity as compared to metals. This property of high resistivity makes them far superior in magnetic memory systems than the previously known laminated metal materials some of which also have square hysteresis loops." (R. 784.)

The reference to "magnetic memory systems" is clearly a reference to a computer which is a device which uses such systems.

The cases on which the court relied in its decision do not support the conclusion that Plaintiff is not entitled to rely upon the 1948 filing date. The case of *Application of Stewart* (C. C. P. A. 1955), 222 F. 2d 747, was not concerned with whether or not an applicant would be entitled to rely on the filing date of an earlier filed application. There was no prior application. The basis of the decision in the *Stewart* case is that where an applicant points out in a specification two equivalent methods of accomplishing a step in a process (washing by swabbing or by spraying), and the prior art shows one of the methods (swabbing) to be old, applicant will not be permitted to argue that his specification is, in effect, wrong and spraying is not the equivalent of swabbing but is far superior thereto.

In the case of *Abbott v. Coe* (U. S. C. A., D. C. 1940), 109 F. 2d 449, there was but a single application involved and the question of whether or not a date could be carried back to an earlier application simply did not arise. The court merely held that **patentability** cannot be urged on the basis of an advantage not disclosed in the specification but raised for the first time after the claims were rejected by the Patent Office.

Another case relied on by the court below was *Larsen Products Corporation v. Perfect Paint Products, Inc.* (D. C. Md. 1961), 191 F. Supp. 303. The facts in the *Larsen* case are quite different from the facts in this case. The public use which was the prime factor in invalidating the claims of the patent which issued on a continuation-in-part application, occurred more than a year prior to the filing date of the parent application. Thus, the public use was early enough to invalidate the parent application. Furthermore, the specification in the parent case stated that the film could either be allowed to dry or not before the plaster was applied, but in arguing validity of the second case, the patentee claimed that the drying was an essential step. In other words, like the *Abbott v. Coe* case, *supra*, the patentee took the position that the original application was wrong in stating, in effect, that it was immaterial whether the film was allowed to dry or not, a position which the court refused to accept.

### **A Compound or an Article Cannot Be Repatented Because Someone Discovers a New Use for It.**

One of the most firmly established points in patent law is that a compound or article cannot be repatented simply because someone has discovered a new use for it. The reason for the rule is perfectly clear. If everyone discovering a new use for a particular compound could obtain a



separate patent on each such use, the Patent Office and the Courts would be flooded with a myriad of patents covering old products or old compositions every time someone thought of a new use for them. A manufacturer manufacturing and selling a compound would have to inquire into the customer's intended use of it before the manufacturer would know whether or not his sale thereof constituted patent infringement. If this was the law, one could in effect repatent the wheel if he could think of a new use for it. In the *Kirchner* case, *supra*, the Court quoted with approval the Board of Interference Examiners when it said,

“Coan's view is untenable and if adopted could lead to extraordinary results. Thus, the same compound could be repatented as often as a new use could be found, merely on the ground that the invention was different and even an infringer of a patented compound could escape by the same route.” (305 F. 2d 807, 903.)

The Court of Customs and Patent Appeals in the case of *In re Thuan*, 135 F. 2d 344, stated at page 347:

“That appellant has made a valuable discovery in the new use of the composition here involved we have no doubt, and it is unfortunate for him if he cannot make claims adequate to protect such discovery, but to hold that every new use of an old composition may be the subject of a patent upon the composition would lead to endless confusion and go far to destroy the benefits of our patent laws.”

Following the same doctrine, the Court of Customs and Patent Appeals in the case of *In re Shackell*, 194 F. 2d 720, stated at page 728:

“It surely is settled definitely, as a principle of patent law, that a new use for an old composition does not render claims for such use patentable. *In re Thuan*, 135 F. 2d 344, 30 C. C. P. A., Patents, 979, and the several cases therein cited.

“Appellant, however, insists here, in substance, that the researchers did not recite in the references nor disclose any use of the composition which they developed and that he discovered a use for the composition which he developed. He, therefore, urges that this case is distinguishable from the *Thuau* case, *supra*, and like cases.

“We are unable to agree that there is any patentable distinction between discovering a use and discovering a *new* use for a chemical product developed by experimentation. The patent which appellant seeks is for a composition of matter *as a composition*; not for the concept of using the composition.”

Judge Learned Hand has stated and explained this point of law so clearly and succinctly that it would be pointless to attempt to improve upon his language or reasoning. Speaking for the Court of Appeals for the second circuit in the case of *Old Town Ribbon & Carbon Co., Inc. v. Columbia Ribbon & Carbon Mfg. Co., Inc.*, 159 F. 2d 379, Judge Learned Hand said, at page 382:

“The Constitution (Art. I, Sec. 8) gives Congress power to grant limited monopolies for ‘discoveries,’ and there is no antecedent reason for saying that Congress might not, if it chose, issue a patent for a new use of an old physical object, which is in fact closely akin to, if not identical with, an ‘art,’ like a process. There would be nothing unreasonable in so doing; substantially no ‘machine, manufacture or composition of matter’ is ever new throughout; usually it is a combination of elements, all of which are severally old, and the invention consists in the mental act of fabricating the combination. Nevertheless, since 1793, unless a patent disclosed a ‘new and useful art,’ a new ‘machine,’ a new ‘manufacture,’ or a new ‘composition of matter,’ it has not been a valid patent. If it be merely for a new employment of some ‘machine, manufacture or composition of matter’ already known, it makes not the slightest difference how beneficial to the public the new function may be, how long a search it may end, how

many may have shared that search, or how high a reach of imaginative ingenuity the solution may have demanded. All the mental factors which determine invention may have been present to the highest degree, but it will not be patentable because it will not be within the terms of the statute. **This is the doctrine that a 'new use' can never be patentable.** In this circuit we have many times applied it, and it has been recognized elsewhere. As we have said in earlier cases, this does not mean that very slight physical changes in a 'machine,' a 'manufacture' or a 'composition of matter' may not be enough to sustain a patent; the act of selection out of which the new structure arises, is the determinant, and small departures may signify and embody revolutionary changes in discovery; but the law does not protect the act of selection per se, however meritorious, when it is not materially incorporated into some new physical object. From this it follows that it makes no difference how radically Lewis and Menihan's discovery changed the art by making double Ritzerfeld sheets convertible to both processes by the expedient of merely typing one outside face or the other; nor does it make the least difference how completely the discovery, qua discovery, fulfills all those conditions mentioned in *Safety Car Heating & Lighting Co. v. General Electric Co.* It is scarcely necessary to add that the claims in suit are not for an 'art' or 'process.'" (Emphasis added.)

The court below apparently based its decision at least in part on the premise that when it became known that Ferramic A-34 inherently possessed a hysteresis loop which was square in shape, new uses for Ferramic A-34 would result therefrom and a new invention was born. On this premise the court went on to hold that such new uses are the proper subjects of patent protection. The fact that Ferramic A-34 had a square hysteresis loop was first disclosed in the 1951 application Serial No. 253,779, and this led the court to hold that the patent in suit was entitled only to an effective filing date of October 30, 1951.



Thus, the court below stated in its memorandum decision (R. 546):

“Moreover, the cases last above cited, and those with similar holdings, emphasize that **the new use entitled to protection** either ‘must result’ from the product or that the new use did not involve a new principle or was not an unobvious use.

“That it was an ‘unobvious’ use and involved a ‘new principle,’ and was not something that ‘must result’ to one skilled in the art is shown by the experimentation conducted by Papian, and the results disclosed in his thesis.” (Emphasis added.)

This is a misconception of the law governing patents. As pointed out by Judge Learned Hand, a new use can never be patentable. It is the new product or composition of matter which is patentable. This composition of matter (Ferramic A-34) was first disclosed in the 1948 application and that is the date to which the patent in suit is entitled.

In the decision of the court below on a petition for rehearing, the court adhered to its original premise, stating (R. 771):

“The plaintiff says (p. 30, ll. 24-26 of Motion) a square hysteresis loop is a property of the composition. That being so, that *property—and its use*—must have been disclosed in application 67,752 in order to enable the plaintiff to be entitled to the date of its filing, December 28, 1948—more than 12 years before the issuance of the patent in suit.” (Court’s emphasis.)

The trial court’s position that it is the use that can be patented rather than the ingredient proportions of a composition of matter itself is further emphasized in Conclusion of Law No. 2, to the effect that invention cannot reside in the discovery of a particular composition of manganese-magnesium ferrites, “because the ingredients of ferrite bodies can be mixed in any proportion desired.” (R. 790.) If this were the law, no chemical compound could be

patented *per se*, as obviously chemicals can be mixed "in any proportion desired".

### **Magnetized Materials Possessing Square Hysteresis Loops Were Known Prior to 1948.**

In reading the memorandum decision of the court below it becomes increasingly clear that the trial judge believed the essence of the invention to be the discovery that a compound disclosed in the 1948 application possessed, when magnetized, a hysteresis loop which was square in shape. (R. 536.) Furthermore, it is clear that the court felt this point to be exceedingly important because the court below felt that magnetized materials possessing square hysteresis loops were new, and thus that all the myriad uses to which such materials could be put became available for the first time. Illustrating the foregoing, it will be noted that the court stated (R. 537):

"The knowledge that certain materials produced a hysteresis loop when magnetized, is not new, but a *hysteresis loop which becomes square or rectangular* when magnetized and the uses and advantages of such squareness is new, and is the heart of plaintiff's invention." (Emphasis by the court below.)

The fact of the matter is that magnetized materials having square hysteresis loops were known prior to 1948. The publication *PHYSICS*, of September 1935, clearly shows square hysteresis loops. (R. pp. 571-583, particularly R. 573.)

Finding 11 (R. 784) actually could be considered as contrary to the above statement in the court's memorandum decision. Finding 11 reads:

"11. Certain magnesium-manganese ferrites whose ingredient proportions are disclosed in the patent in suit and in said application Serial No. 67,752 inherently have high resistivity as compared to metals, *i.e.*,

they are very poor conductors of electricity as compared to metals. This property of high resistivity makes them far superior in magnetic memory systems than the previously known laminated metal materials some of which also have square hysteresis loops.”

The apparently diametrically opposed statements serve to point up the difficulties besetting the court below in attempting to dispose of a matter of the importance and complicated nature of the present case in summary proceedings. Without the benefit of a full hearing, the court is not in a position accurately to judge the character and scope of the invention. As Judge Holtzoff said in the case of *Allegheny Ludlum Steel Corp. v. Westinghouse Electric Corp.*, 150 USPQ 95 (D. C. D. C. 1966), in denying a Motion for Summary Judgment (at page 95):

“The invention relates to iron alloys, specifically to use of boron in order to make the alloy ductile. The specific invention consists in the use of a specified range of proportions of boron in order to produce the desired quality without any adverse effects. The patent was issued on an application that was a continuation of a prior application.

“For reasons that need not be reviewed here, the validity of the patent depends largely on the question whether the owner of the patent is entitled to the benefit of the earlier filing date of the original application. This, in turn, depends very largely on the degree to which the use of the particular quantities of boron disclosed in the patent and the reasons for it, constitute an invention separate and apart from that disclosed in the original application. This is a matter as to which expert testimony would be admissible. So, too, testimony as to the history of the invention, as well as its relation to the prior art and its commercial utilization, would be relevant. Similarly, the nature of the disclosure in the original application is a matter for expert testimony, since the question is what would be understood by a man skilled in the art. Disclosures of specifications are not intended for the

layman. There are other less important topics concerning which oral testimony would be admissible. The issues cannot be determined by the Court by a mere reading of the documents. *Bridgeport Brass Co. v. Bostwick Laboratories*, 2d C., 181 F. 2d 315, 85 USPQ 89; *Hazeltine Research v. General Electric Co.*, 7th C., 183 F. 2d 3, 5, 86 USPQ 233, 235."

**Summary Judgment Clearly Should Not Have Been Granted as to Claims 2 and 4.**

The court below correctly found that the subject matter of claims 2 and 4 was not disclosed in the first filed application, Serial No. 67,752, but covered the preferred range of manganese-magnesium ferrites of the patent in suit. Claims 2 and 4 do not read on Ferramic A-34, and the range specified in claims 2 and 4 is not disclosed in the Papian thesis nor in the ELECTRICAL MANUFACTURING publication, nor were manganese-magnesium ferrites within the range of claims 2 and 4 in public use or on sale more than one year prior to the filing of the application Serial No. 253,779, on which the court below specifically found that plaintiff is entitled to rely.

The court held as a conclusion of law that claims 2 and 4 differed only in degree from claims 1 and 3, and hence were invalid. There is no finding of fact to support such a conclusion, but assuming Conclusion of Law No. 14 to be more in the nature of a Finding of Fact, there was no evidence before the court to support such a finding. Mr. Snyder testified that the hysteresis loops generated by the materials covered within the range of claims 2 and 4 were the squarest within the range of proportions disclosed. (R. 292-93.) Thus, he stated that the difference in squareness was a matter of degree. (R. 293.) This is not a difference in proportions of compositions of matter, this is a difference in the shape of the hysteresis loops. Obviously, there



can be materials which are not even manganese-magnesium ferrites but which have hysteresis loops which are identical in squareness with the hysteresis loops formed by the ferrites of claims 2 and 4. To say that two products differ only in degree because their performances differ only in degree is clearly an erroneous conclusion.

**The Invention Involved in the Patent in Suit  
Is Exceedingly Important and Has Contributed  
Greatly to Industrial and Scientific Progress.**

The importance of the invention of the patent in suit can be illustrated by reference to Finding 11 quoted just above, which points out that previously known laminated metals possessed square hysteresis loops. The significance of a square hysteresis loop in a magnetized product is primarily because such a product can act as a switch, *i.e.*, as a memory storage device. Thus, the products of the present invention may be used as cores in a computer and form a part of the memory system thereof. It is possible to construct a computer utilizing laminated metal magnets possessing square hysteresis loops as part of the memory system. Computers have also been made wherein vacuum tubes are utilized as the "memory" component.

The memory cores made of the material of the present invention, however, are infinitely smaller in size than either a vacuum tube or a laminated metal magnet. The size of a manganese-magnesium ferrite memory core is about the size of a dot over an "i" as printed in this brief, and over a *million* of such cores could be contained in the space occupied by a single vacuum tube. Probably a *hundred thousand* of the memory cores of the present invention would be needed to fill the space occupied by a single laminated metal magnet. Furthermore, the response time of the memory cores of the present invention is approxi-

mately 40 times faster than the response time of laminate metal magnets. (R. 6; 360, 380, 385.)

As a matter of fact, the present invention opened the door to the development of the modern computer. Computers can now be made occupying a corner of a room rather than an entire building and, of course, the maintenance and upkeep is infinitely less.

Licenses under the patent in suit have been taken by such companies in the computer field as Ampex Corporation, Remington Rand, Western Electric, RCA, and others. (R. 99.)

A patent of this importance should not be dealt with summarily, nor should an important invention be struck down without a full hearing on the merits. After all the evidence is before the court, the court will then be in a position to decide what is "the essence of the invention". Until that evidence is all before the court, the court is not in a position to judge the merits of the invention and to afford it the status it deserves.

### CONCLUSION.

The court below based its decision holding claims 1 and 3 invalid on the sale of, and publications concerning, a single manganese-magnesium ferrite material, namely, Ferramic A-34. The sales and publication, however, occurred after a patent application was on file specifically disclosing Ferramic A-34. There was no hiatus in the pendency of applications before the Patent Office from the filing date of that first application to the filing date of the application which resulted in the patent in suit. The manganese-magnesium ferrite Ferramic A-34 was continuously presented to the Patent Office from the first application to the issue of the patent in suit. This being the situation, the court erred in holding claims 1 and 3 invalid. The court also erred in

concluding that claims 2 and 4 differed only in degree from claims 1 and 3 and thereby holding claims 2 and 4 to be invalid. Defendant's Motion for Summary Judgment should have been denied.

Respectfully submitted,

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#### CERTIFICATE.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM J. STELLMAN.





No. 22,088

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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INDIANA GENERAL CORPORATION,

a Corporation,

*Plaintiff-Appellant,*

vs.

LOCKHEED AIRCRAFT CORPORATION,

a Corporation,

*Defendant-Appellee.*

**BRIEF FOR DEFENDANT-APPELLEE**

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JAN 18 1968

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No. 22,088

IN THE

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INDIANA GENERAL CORPORATION,  
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*Plaintiff-Appellant,*

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*Defendant-Appellee.*

**BRIEF FOR DEFENDANT-APPELLEE**

---

**STATEMENT OF THE CASE**

Appellant's statement of the case is oversimplified and highly misleading. The real question in the case is this:

Where a first patent application discloses and claims a first *range of ingredient proportions* within which a known chemical compound possesses a first useful property, and a second patent application discloses and claims a different but slightly overlapping *range of ingredient proportions* within which the same chemical compound possesses a second and different

useful property, does the publication and public use for purposes involving the second property, of a material lying in the overlapping portion of both ranges, subsequent to the first application but more than a year before the second application, invalidate a patent derived from the second application?

The essential facts are as follows:

1. It was known as early as 1936 that ceramic bodies of magnesium-manganese ferrite could be made by shaping and firing mixtures of magnesium oxide, manganese oxide, and ferric oxide, and that these bodies had magnetic properties. (Snoek article, R. 683-704; Finding 28, R. 788).

2. On December 28, 1948, plaintiff's assignor filed patent application Serial No. 67,752. That application disclosed that magnesium-manganese ferrites whose ingredient proportions lie within a first specified range exhibit the unexpected advantage of having dielectric and insulating properties. (R. 886-924; Findings 15-18, R. 785-787). One of three examples (Example 3, R. 892) given in S.N. 67,752 of materials having ingredient proportions lying within the specified range was a material known as Ferramic A-34 (Finding 26, R. 788). There is no mention anywhere in S.N. 67,752 of anything concerning a hysteresis loop (a parameter relating to the magnetic properties of magnetic materials). (Finding 16, R. 786).

3. On May 10, 1949, Ferramic A-34 was placed on sale by plaintiff's predecessor. It was then used for electrical inductance uses in which its low-loss dielectric and insul-



lating properties were useful. (R. 277; Finding 20, R. 787; ll. 13-18, p. 2 of Snyder affidavit, R. 447).

4. In December 1949, plaintiff's predecessor caused to be published in the magazine "Electrical Manufacturing" an article (R. 271-276) discussing various ferrites and showing a photograph of the hysteresis loop of Ferramic A-34. The photograph showed the loop to be square. (R. 275; Finding 21, R. 787).

5. Square hysteresis loops are a highly useful property of some magnetic materials. Memory core materials for computers must have a square hysteresis loop in order to function as magnetic switches. (R. 6, col. 2, ll. 30-34 and 39-41). (Finding 12, R. 784).

6. Sometime in the summer of 1950, one W. N. Papian acquired some Ferramic A-34 from plaintiff's predecessor (R. 186, first paragraph) and used it in a research project on memory core materials for computers. He published his research and findings in his master's thesis, which the Court below found to have become a publication in the legal sense on or about October 19, 1950. (R. 311-394; Finding 24, R. 788, supported R. 309-311).

7. On October 30, 1951, plaintiff's assignor filed patent application Serial No. 253,799 (R. 234-245), from which the patent in suit was eventually derived. This application disclosed that magnesium-manganese ferrites whose ingredient proportions lie within a second specified range, *different* from the range specified in S.N. 67,752, exhibit the unexpected advantage of having square hysteresis loops. (Findings 9, 10, 13, R. 784). There is no mention of dielectric properties in the specification of the

patent in suit, only of the high resistivity said in S.N. 67,752 to be a known property of ferrites in general.<sup>1</sup>

8. The range of S.N. 67,752 overlaps the range of claims 1 and 3 of the patent in suit to a minor extent. The ingredient proportions of Ferramic A-34 are in the overlapping area. (Finding 31, R. 789). Ferramic A-34 is one of the examples given in S.N. 253,779 but is not specifically listed as an example in the patent in suit. *All other* examples given in S.N. 67,752 and *all* the examples listed in the patent in suit are *outside* the overlapping area (see triaxial diagram in Finding 15, R. 785).

9. The range defined by claims 2 and 4 of the patent in suit does not include Ferramic A-34. However, the patent in suit fails to disclose *in what way* the area of claims 2 and 4 differs from the area of claims 1 and 3

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<sup>1</sup>S.N. 67,752 states:

"Ferromagnetic ceramic bodies having the general formula  $M''O.Fe'''_2O_3$  where M signifies a bivalent metal, *are known to have magnetic properties and to have a certain amount of resistance to the flow of an electric current.* Such bodies may be considered as semi-conductors since the specific resistance of such materials (when formed into core bodies for inductances, for example) is in the range of  $10^2$  to  $10^6$  ohms per centimeter cube. This resistance is an improvement over the metallic iron powder core or other ferromagnetic core materials but for many purposes, for example, where the magnetic part actually contacts conducting parts of the circuit, or where the magnetic part carries a conducting part or a conducting layer which forms part of the circuit, it would be desirable to have magnetic bodies which are insulators (rather than semi-conductors) or which have properties approaching or equalling those of a dielectric material." (ll. 4-18, R. 888; emphasis supplied)

"Ferromagnetic materials of the general formula stated above *as now made* usually have a mol proportion close to  $x:y=1:1$ ; such substances have a resistance which does not exceed  $10^6$  ohm. cm even when the very resistant MgO is the bivalent metal oxide present." (ll. 20-24, R. 889; emphasis supplied)

except to state that it is "preferred". (R. 7, col. 3, ll. 46-47). (Finding 29, R. 789; Conclusion 10, R. 791). The reason for the preference is not given. On the basis of that fact, corroborated also by the deposition testimony of plaintiff's vice-president as quoted at R. 292-293 (set out in fn. 19, p. 33 hereof), the Court below concluded that claims 2 and 4 differed only in degree from claims 1 and 3.

Appellee submits that the Court below correctly found that:

(1) the invention disclosed and claimed in the patent in suit is the *range* of ingredient proportions in which magnesium-manganese ferrites exhibit the unexpected property of square-loopness;

(2) that invention was not disclosed or claimed in S.N. 67,752;

(3) a publication and public use for the purposes of that invention, of a material readable on some claims of the patent in suit more than one year prior to the filing of application S.N. 253,779 invalidated those claims;

(4) the remaining claims in suit, differing only in degree from the invalidated claims, are also invalidated by the same publication and public use.

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#### **RESPONSE TO SPECIFIC ASSIGNMENTS OF ERROR**

1. Finding 20 finds a sale of Ferramic A-34 in 1949 (R. 277) for uses not involving its square-loop characteristic (R. 447); Conclusion 5 holds claims 1 and 3 invalid on grounds of publication and public use of the

square-loop invention recited in those claims. Hence, Conclusion 5 is not meant to be based directly on Finding 20. (See also our response to Error Assignment 7).

2. This goes to the heart of the case. The crux of the matter is that the patent's claims 1 and 3 are not directed to the material Ferramic A-34 as such, but to a range of compositions which happens to *include* Ferramic A-34—a vital distinction explained at length in the Argument.

3. The Court correctly found that the publication in 1949 of the square-loop property of one composition (Ferramic A-34) included within the range of compositions claimed in claims 1 and 3 of the patent in suit as square-loop compositions invalidates those claims, even though Ferramic A-34 had previously been disclosed to be a member of *another* range of compositions distinguished by a *different* kind of useful property.

4. Having failed to traverse the M.I.T. librarian's affidavit when it had a chance to do so, plaintiff is stuck with all reasonable inferences to be drawn from it. Certainly, the Court was justified in concluding from that affidavit that the Papian thesis became a "publication" before October 30, 1950.<sup>2</sup> Beyond that, we have the same comments as in respect to Error Assignment 3 above.

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<sup>2</sup>This date can be (and was, R. 309-311) established by evidence of regular library procedures: *Ex parte De Grunigen*, 132 USPQ 152 (P.O.Bd. App. 1958); 1961 C.D. 75 (Commissioner of Patents, 1961). Besides, it is the date of *receipt* at the library (here Oct. 9, 1950) that counts. In *Gulliksen v. Scott*, 75 USPQ 252, 257 (P.O.Bd. App. 1937), the Board said:

"Since both affidavits referred to above clearly show that the thesis was received September 25, 1929, it is held that the dates when the same was bound or indexed is of no importance for the thesis became available to the public as soon as received in the library."

5. This again is the heart of the case. We refer the Court to the Argument for a discussion of why the Court below correctly found that the subject matter of the claims in suit was not disclosed in the patent application S.N. 67,752, and hence is not entitled to that application's filing date of December 28, 1948.

6. Same comments as in regard to Error Assignment 5 above.

7. Ferramic A-34 being a staple article of commerce as early as May, 1949 (R. 277, Finding 20, R. 787), no statement of ingredient proportions in the publications was necessary. Even though there is no evidence that any outsider ever *did* analyze Ferramic A-34, there is no dispute that anybody *could* have done so if he were interested.

8. This Error Assignment ignores the fact that the patent in suit does not *claim* Ferramic A-34; instead, it claims a range of materials distinguished by the square-loop property. S.N. 67,752, on the contrary, discloses another range of materials distinguished by *another* property. Ferramic A-34 merely happens to be included in both ranges.

9. Although Ferramic A-34 is *covered* by the claims of both S.N. 67,752 and the patent in suit, the claims of *neither* are *directed* to Ferramic A-34, and that makes all the difference in the world.

10. We refer to the Argument for the detailed showing of why the Court's finding in this respect was correct. "The manganese-magnesium ferrite material there-



in<sup>3</sup> disclosed'' (i.e., the range K-L-M-N of Fig. 3) in fact *did not have* square-loop properties except in a minority of instances.

11. Findings 13, 14, and 17 (R. 784-786) are supported by the 1936 Snoek article (R. 683 et seq., particularly R. 702-703), which constitutes indisputable evidence of what was old.

12. We refer to the Argument for a full discussion of why the Court's holding was correct in this respect on the basis that claims 2 and 4 differ only in degree from claims 1 and 3.

13. The Court was bound by the words of the patent in suit. No extraneous evidence can supply what is not in the patent.<sup>4</sup>

14. Again we refer to the Argument for a discussion of this point, which goes to the heart of the case.

15. The Court correctly found that the ranges, and the properties associated with each, were *different* in S.N. 67,752 than in the other applications.

16. The Court below simply made no such conclusion.

17. Inasmuch as the group or range of compositions disclosed in the 1948 application was materially different from the group or range of the patent in suit, the Court committed no error in this respect.

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<sup>3</sup>In S.N. 67,752.

<sup>4</sup>*Minnesota Mining and Mfg. Co. v. Carborundum Co.*, 155 F. 2d 746, 749 (C.A. 3, 1946):

"... the words of a patent or patent application, like the words of specific claims therein, always raise a question of law for the court and may not be determined by the opinion of experts."

18. As pointed out in the Argument, there are no disputed issues of fact capable of affecting the outcome.

19. The quoted statement of the Court is not made the basis of any finding, and the context clearly indicates that the technical inaccuracy in this statement is no more than a slip of the pen. Moreover, the Court on appellant's motion for reconsideration corrected itself and still came up with the same result (R. 769).

20. This again goes to the heart of the case, and we refer to the Argument for a full discussion of this point.

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### SUMMARY OF THE ARGUMENT

The invention disclosed and claimed in the patent in suit is not, as appellant urges, a single chemical composition as such, but rather the range, as a coherent entity, of ingredient proportions of a known chemical compound within which the compound exhibits a particular useful property.

Thus, the property is inseparably interwoven in the *range* of compositions claimed in the patent in suit, and the claims would be senseless in the absence of a reference to the property which gave them birth.

The untimely publication and public use of a material lying in the claimed range, *for the property underlying that range*, is fatal to any claim of the patent in suit which includes that material.

The fact that this same material was previously disclosed in a prior application to lie within a *different*, though slightly overlapping, range associated with a *dif-*



*ferent* useful property cannot save the anticipated claims, because the prior application was directed to a different invention altogether.

The patent claims which are not directly anticipated differ only in degree from the anticipated ones, and must therefore fall with them as a matter of law.

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## ARGUMENT

### 1. BACKGROUND

It is axiomatic that the basic purpose of the patent laws is to give an inventor a limited monopoly over his invention in exchange for teaching the public, by way of the patent, something new and useful.<sup>5</sup> The key to this whole lawsuit lies in a straight-forward, common-sense application of that principle to the undisputed facts of this case.

The facts are really quite simple. In 1948, appellant discovered that a certain known ceramic compound (called magnesium-manganese ferrite) exhibits peculiar dielectric and insulating properties when its ingredients are mixed within a certain range of proportions. Appellant thereupon applied for a patent on all embodiments of the old

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<sup>5</sup>*International Nickel Co. v. Ford Motor Co.*, 166 F. Supp. 551, 561-562 (S.D.N.Y., 1958) quoting from *Pittsburgh Iron & Steel Co. v. Seaman Sleeth Co.*, 248 F. 705 (C.A. 3, 1917):

"The Patent Law seeks to reward those who teach the public how to perform, process or construct things which the public theretofore was unable to do because of insufficient information."

compound whose ingredient proportions lie within that range.

In 1949, appellant placed one such dielectric embodiment (called Ferramic A-34) of the compound on the market. Appellant now discovered that Ferramic A-34 also has another peculiar property: it has a square hysteresis loop. Appellant published that fact in 1949, and a university researcher used appellant's material in early 1950 for computer research which required the square hysteresis loop property.

In late 1951, appellant filed a patent application stating that the same known ceramic compound (i.e. magnesium-manganese ferrite) has square-loop properties when its ingredients are mixed within another, different range of proportions. The two ranges do slightly overlap; and Ferramic A-34 is located in the overlap. Appellant succeeded in obtaining a patent which claims, as a group, all embodiments of the old compound whose ingredient proportions lie within the square-loop range.

The crucial question is: Does the 1948 application disclosing and claiming the *dielectric* range of embodiments support the patent claims claiming the *square-loop* range of embodiments just because a few embodiments happen to have both dielectric *and* square-loop properties? If it does, a reversal is indicated. If it does not, the 1949-50 publications and use constitute a statutory bar, the Court below was right, and its judgment should be affirmed.

Applying the basic policy of the patent laws to this situation, the result is clear: In the 1948 application the public was *not* taught how to mix, or how not to mix,

the ingredients in order to get a square-loop material.<sup>6</sup> Since that teaching is the quintessence of the claims of the patent, the patent claims are obviously *not* supported by the 1948 application.

Seen in this light, it is evident that appellant's entire case rests on a simple, concise, and fatal fallacy: The patent in suit is *neither* a patent for the specific composition known as Ferramic A-34, *nor* a patent for the old chemical compound known as magnesium-manganese ferrite. It is a patent on a coherent *group* of compositions distinguished by their common property of square-loopness. Once this basic truth is understood, appellant's case falls like a house of cards, as we will now explain in detail.

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<sup>6</sup>It might be argued that the publication and use of Ferramic A-34's square loop did not teach the public the *extent* of the range within which square loopness occurs. But that is of no consequence: the law is clear that the invention resides in the discovery that such a range *exists*, and the routine process of determining the precise limits of the range is not of itself inventive, as this Court has held in *Locklin v. Switzer Bros., Inc.*, 299 F.2d 160 (1961), quoting *Application of Aller*, 220 F.2d 454, 456 (C.C.P.A. 1955):

"More particularly, where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation."



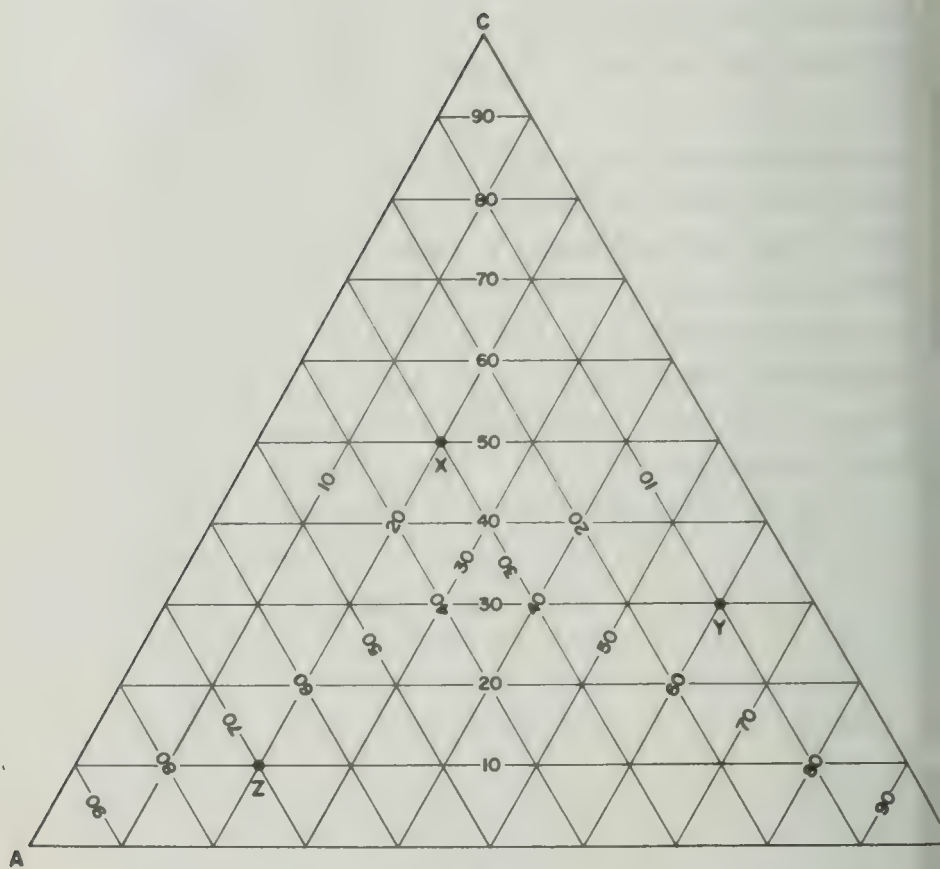


Fig. 1

## 2. HOW TO READ A TRIAXIAL DIAGRAM

Before getting into a detailed discussion of the patent in suit, it is necessary to understand what a triaxial diagram is. If the reader already knows, this section may be skipped.

A triaxial diagram is a graphic representation of all possible mixture proportions of a chemical compound which contains three specified ingredients. Fig. 1 inserted opposite shows a typical triaxial diagram.

In Fig. 1, the apex A of the triangle represents a composition which contains 100% of ingredient A and 0% of ingredients B and C. The line BC represents all possible compositions which contain 0% of ingredient A. For example, end B of that line represents a composition which is 100% B; the midpoint of line BC represents a composition which is 50% B and 50% C; and the end C of the line represents a composition which is 100% C.

Any point inside the triangle ABC represents a composition which contains some A, some B, and some C. The position of the point in the triangle determines how much A, B, and C, respectively, is in the composition represented by that point. For example, point X represents a composition containing 30% A (note that it is located on the line marked "30" parallel to the line BC), 20% B (the line marked "20" parallel to AC), and 50% C (the line marked "50" parallel to AB).

Likewise, point Y in Fig. 1 represents a composition containing 10% A, 60% B and 30% C; and point Z represents a composition containing 70% A, 20% B, and 10% C.



### 3. THE PATENT IN SUIT

Appellee notes with interest that nowhere in its brief did appellant dare quote the patent in suit (R. 5-9) or any of the antecedent applications involved to show the Court what the invention is all about. Consequently, we shall first of all correct that omission.

Fig. 4 of the drawing of the patent in suit is reproduced opposite as Fig. 2 of this brief.

It will be seen that this figure is a triaxial diagram representing all possible compositions made up of the ingredients magnesium oxide ( $\text{MgO}$ ), manganese oxide ( $\text{MnO}$ ) and iron oxide ( $\text{Fe}_2\text{O}_3$ ).

Drawn onto this triaxial diagram is a line A--B--C--D--E--A encompassing a specific area of the diagram. There is also a line G--H--I, but that line is unimportant for the moment and will be discussed later herein.

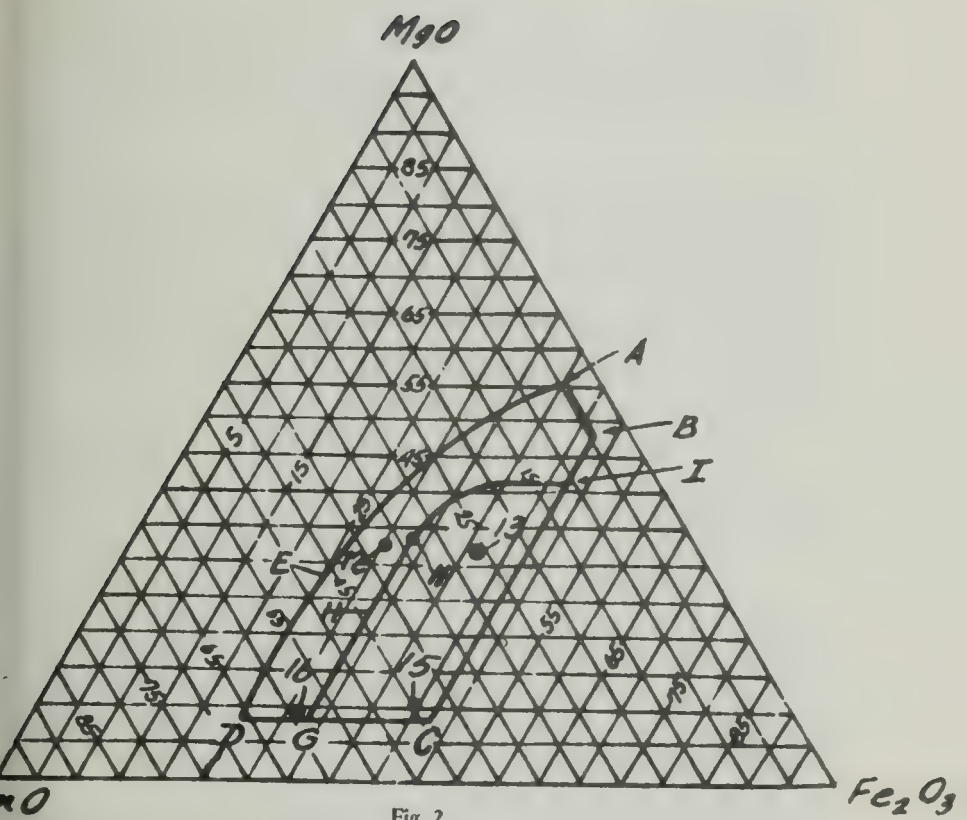
The patent in suit (whose title is "SQUARE LOOP FERRITES") says in essence the following (col. 1, ll. 16-26; col. 3, ll. 22-25):

"This invention relates to the production of ferromagnetic ceramic bodies which have hysteresis loops of substantially square or rectangular shape and to the bodies so produced.

Among the objects of the invention is to provide a approach very closely to a square or rectangular shape. (sic)

Among other objects of the invention is to provide a ceramic type of ferromagnetic material which has a substantially square or rectangular hysteresis loop







and a very high speed of action, for example of (sic) the order of one micro-second or less.

\* \* \*

The proportions of the components in the MgO--MnO--Fe<sub>2</sub>O<sub>3</sub> system which produce square loop ferrites are those within the area A--B--C--D--E--A of Fig. 4 of the drawing."

As a matter of explanation, all magnetic materials have a so-called hysteresis loop, which is a graphic representation of how reluctant the material is to change its magnetization back and forth when it is subjected to the action of an alternating electric magnetizing current. As appellant correctly states in its brief (p. 4), this graphic representation can, by well-known methods, be made to appear as a luminous trace on the screen of an oscilloscope to which a sample of the material is connected. This trace can be observed and photographed.

Most magnetic materials have a hysteresis loop that looks somewhat like a stylized "S" with a more or less bulging mid-section (see, e.g. the traces of Ferramic B-90, C-156, D-146, and E-141 on p. 87 of the *Electrical Manufacturing* article (R. 272)). Some magnetic materials (e.g. certain old metal alloys (R. 573) and some of the ferrites involved here) have a hysteresis loop in which the bulging mid-section has more or less square corners (see the trace of Ferramic A-34 in the *Electrical Manufacturing* article (R. 272), shown in enlarged form at R. 400). These so-called square loop materials are useful, i.e., in computers because, to quote the patent in suit,

“In use, the sharp cornered materials give an effect similar to the sudden snapping in a mechanical switch and since these ferrites are used to produce effects analogous to switching this property is every important.” (col. 2, ll. 30-34).

Coming back to our analysis of the patent in suit, the patent goes on to define “square loop”, discusses the ingredients of the triaxial diagram and possible substitutes, and gives seven examples of how core bodies of various ingredient proportions can be made from specified raw materials. The patent concludes with six claims, a typical one of which defines the invention of the patent in suit as follows:

1. A fired ferromagnetic ferrite body *having a square hysteresis loop* consisting essentially of a manganese-magnesium ferrite and consisting essentially of 8-55 mol percent of magnesia, 4-67 mol percent of manganese oxide and from 25 to about 47.5 mol percent of ferric oxide, *the proportions of said components being within the (area) A--B--C--D--E--A of Fig. 4 of the drawing.* (Emphasis and parenthetical matter supplied)

This recitation of the square loop property and of the ingredient proportion area in which it occurs forms part of, and constitutes the essence of, *every* claim of the patent in suit.

**4. IF APPELLANT'S POSITION IS CORRECT, THE PATENT IN SUIT IS INVALID ON ITS FACE AS DIRECTED TO UNPATENTABLE SUBJECT MATTER**

If appellant's assertion throughout its brief that the square-loop property is merely a *new use* of Ferramic A-34 is to be believed, then the patent in suit is actually an invalid attempt to patent, by way of article claims, a new use of an article of manufacture (a fired magnesium-manganese ferrite body) which was known as early as 1936. Appellant devotes the major part of its brief to the proposition that a new use of an old thing simply cannot be patented unless it is claimed as a process (which is not the case here). There is little we can say to improve upon appellant's argument in that respect.

Take claim 1, quoted above, and delete from it all language *not* relating directly to the square hysteresis loop property. What is left is this:

"A fired ferromagnetic ferrite body . . . consisting essentially of a manganese-magnesium ferrite . . .".

Was that new even in 1948?<sup>7</sup> Of course not. The Snoek article (R. 683 et seq.) discloses, as early as 1936, the existence of fired ferromagnetic ferrite bodies consisting essentially of a manganese-magnesium ferrite. At pp. 481-482 of that article (R. 702-703), Snoek discusses "mixed" ferrites, i.e. ferrites made up of iron oxide and two other oxides. In Table VI, Snoek shows that the Curie point for a manganese-magnesium ferrite is 330° centigrade.

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<sup>7</sup>The earliest application involved in this lawsuit has a filing date of December 28, 1948.

“Curie point” is defined in Van Nostrand’s Scientific Encyclopedia, Third Edition (1958), p. 463, as follows:

“*Ferromagnetic materials* lose their permanent or spontaneous magnetization above a critical temperature (different for different substances). This critical temperature is called the Curie point.” (Emphasis supplied).

At p. 466 of the same article (R. 687), Snoek explains on what bodies his measurements were made:

“The specimens had the form of long and thin rectangular bars (60 x 2 x 3 mm).”

That these bars were fired appears, i.e., from Snoek’s statement at pp. 463-464 of the article (R. 684-685) that the ferrites

“... can be made by thoroughly mixing the finely divided oxide components in powder form, pressing it into a bar and heating the latter for a long time in air or oxygen at temperatures varying from 1000°-1300°C according to the nature of the added oxide.”

This process is “firing” within the broad meaning of the patent in suit since, in at least one example of the patent, a “finely divided and thoroughly mixed . . . powder (of the oxide components) . . . shaped by pressing” (ll. 21-25, col. 4) is “*fired* in air at about 2350°F (i.e. about 1286°C) . . .” (l. 68, col. 4). (Emphasis and parenthetical matter supplied).

Appellant does not contest the fact that the Snoek article is a prior art publication within the meaning of 35 USC 102 (a). Therefore, taking appellant’s view:



*Fired ferromagnetic ferrite bodies consisting essentially of a manganese-magnesium ferrite being old, the novelty, if any, claimed in the patent in suit consists of nothing more than an unpatentable newly discovered property or use of some of those bodies, and a statement of which of those bodies have that property or use.*

Thus, if appellant's view that the square-loopness is merely a new use of an old composition, that composition has to be magnesium-manganese ferrite as such, and appellant is defeated by his own principal authority, *Application of Kirchner*, 305 F. 2d 897, 903 (C.C.P.A. 1962) as quoted by appellant at p. 26 of its brief:

“Coan's view is untenable and if adopted could lead to extraordinary results. Thus, the same compound could be repatented as often as a new use could be found, merely on the ground that the invention was different and even an infringer of a patented compound could escape by the same route.”

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## 5. THE NATURE OF THE INVENTION

If the Court is not disposed to espouse appellant's view and consequently to hold the patent in suit invalid on its face as directed to a new use of an old compound, on the basis of the reasoning outlined above, it next becomes necessary to consider what the invention has to be.

Appellant urges that the invention of the patent in suit is a composition of matter. We have referred to it as an article of manufacture, because it is claimed as a “body” rather than a “ferrite” as such. Either way, the proportion of ingredients of the ferrite that makes



up the body is the gist of the claims and of the litigation.

If, as appellant says, the invention is a composition of matter, *what* composition of matter can it be? Can it be magnesium-manganese ferrite as such? No, because magnesium-manganese ferrite was already known to Snoek in 1936. Can it be the *specific* composition of Ferramic A-34 alone? No, because Ferramic A-34 was *merely one example* of a *group* of compositions having a *common utility* (a square hysteresis loop). This *group* of compositions was always treated and defined *as a group*, e.g. "... a manganese-magnesium ferrite . . . , the proportions of said components being within the (area) A--B--C--D--E--A of Fig. 4 of the drawing."

That a group or *range* of ingredient proportions of a known composition, which group has a common peculiar utility, is patentable *per se* appears from plaintiff's own case of *Allegheny Ludlum Steel Corp. v. Westinghouse Electric Corp.*, 150 USPQ 95 (D.C.D.C. 1966), (Plaintiff's brief, p. 31) in which Judge Holtzoff said "The specific invention consists in the use of a specified *range of proportions* of boron in order to produce the desired quality . . ." (Emphasis supplied).

If the invention had been Ferramic A-34 as such, the claim would have had to read "A fired ferromagnetic ferrite body consisting essentially of a manganese-magnesium ferrite consisting essentially of 52 mol percent of magnesia, 7 mol percent of manganese oxide, 41 mol percent of ferric oxide, and 1 mol percent of zinc oxide", because that is the composition of Ferramic A-34 (R. 139). Appellant, we believe, will agree that none of

appellee's products (identified at R. 227) come anywhere near that composition of Ferramic A-34. Hence, *if the invention had been Ferramic A-34*, appellee would not have infringed it and this lawsuit would never have existed.

To recapitulate:

1) The invention of the patent in suit cannot be manganese-magnesium ferrite as such;

2) It cannot be Ferramic A-34 as such;

3) It therefore can only be the group, *as a coherent group*, of ferrites within the area A--B--C--D--E--A. Perhaps this point, if not already clear, can best be explained by a simple analogy. It is rather obvious, we believe, that if widgets are known, you cannot get a patent on blue widgets unless you can show that blue widgets can do something unobvious that no other widgets can do.

This case presents the same situation: manganese-magnesium ferrites being known, you cannot get a patent on manganese-magnesium ferrites within the area A--B--C--D--E--A unless you can show that the ferrites within that area have the unobvious useful property of a square hysteresis loop that the ferrites *outside* that area do *not* have.

In other words, in the absence of the square hysteresis loop as part and parcel of the invention, the limitation of the area A--B--C--D--E--A doesn't make any sense. If you know, as Snoek did in 1936, that you can make fired ferromagnetic ferrite bodies out of manganese oxide, magnesium oxide, and ferric oxide, you would have no

reason to mix the ingredients in one proportion rather than another *unless* you knew that certain specific proportions would give the body the particular properties needed for the *use* to which you propose to put the body.

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#### 6. APPLICATION SERIAL NO. 67,752

At this point it becomes necessary to consider the parentage of the patent in suit. Appellant claims (see patent in suit, col. 1, ll. 43-48) that the invention of the patent in suit is derived, through various continuation-in-part applications,<sup>8</sup> from application Serial No. 253,779<sup>9</sup> filed October 30, 1951. So far we agree. But then appellant claims (and here we disagree) that the relevant subject-matter of S.N. 253,779 was disclosed earlier in application Serial No. 67,752<sup>10</sup> filed December 28, 1948, of which S.N. 253,779 purports to be a continuation-in-part.

Consequently, let us compare the disclosure of the patent with the disclosure of S.N. 67,752. S.N. 67,752 starts out:

“This invention relates to a composition of matter which has magnetic properties and at the same time has high insulating properties.”

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<sup>8</sup>A continuation-in-part application is one which discloses all or part of the subject matter of a previously filed application plus something new. As to the *old matter*, the effective filing date is the date of the previous application; as to the *new matter*, it is the date of the continuation-in-part application.

<sup>9</sup>File wrapper at R. 234-270; text of the application at R. 236-243, drawing at R. 245.

<sup>10</sup>File wrapper at R. 886-924; text of the application at R. 888-894. No drawing.

The statement of objects is more explicit:

“An object of this invention therefore is to provide a ferromagnetic body *which has insulating properties*.

Another object of the invention is to provide a ferromagnetic body *which has insulating and dielectric properties*.

Another object of the invention is to provide a core body of magnetic ferrite materials *which has insulating and dielectric properties.*” (Emphasis supplied).

There follow other objects of similar import, a discussion of resistance properties of ferrites in general, examples including manufacturing method data, and claims of which the following is typical for the purposes of this case:

4. A ceramic body having magnetic properties *and having a specific resistance in the order of  $10^8$  to  $10^9$  or more and a power factor of less than 2% consisting essentially of a magnesium ferrite of the general formula  $x \text{ MgO} \cdot y \text{ Fe}_2\text{O}_3$  in which  $x:y$  is between 1.6:1 and 2:1, said ferrite composition containing MnO as a fluxing agent in the proportion of less than 10% but in sufficient quantity to decrease the firing range of said composition to a temperature of less than  $1400^\circ\text{C}$ .* (Emphasis supplied)

MnO, of course, is manganese oxide; MgO is magnesium oxide, and  $\text{Fe}_2\text{O}_3$  is ferric oxide.

Note that *nowhere* in S.N. 67,752 is there *any* mention of the square hysteresis loop property. It is clear from the specification of S.N. 67,752 (e.g. at R. 890, ll. 5-6) that the “magnetic properties” referred to in the quoted pas-

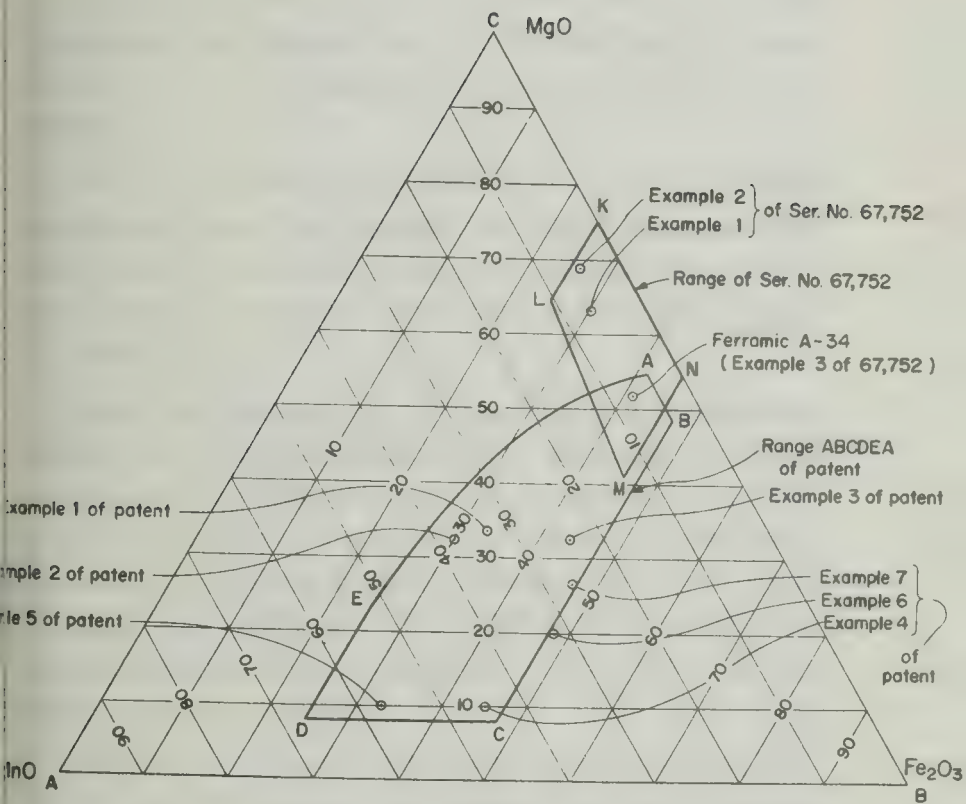
sages are simply the ferromagnetism inherent in manganese-magnesium ferrites, as already recognized by Snoek.

S.N. 67,752 has no drawing, but it is possible by simple calculations on the basis of that application's specification, which discloses broadly a magnesium oxide-ferric oxide ratio of between 1.2:1 and 3:1 (R. 889, ll. 17-18) and a magnesium oxide content of not more than 10% (R. 890, ll. 22 and 27-28), to plot on a triaxial diagram an area K--L--M--N (R. 679) representing all possible compositions within that disclosure. The relationship between that area K--L--M--N and the area A--B--C--D--E--A of the patent in suit is shown by the triaxial diagram of Fig. 3 inserted opposite.

The following facts appear from Fig. 3 and from the listing of appellee's products (R. 227):

- 1) A minor portion of the area K--L--M--N overlaps a minor portion of the area A--B--C--D--E--A;
- 2) Ferramic A-34 lies in the overlapping portion;
- 3) All other examples of S.N. 67,752 and all examples of the patent in suit lie outside the overlapping portion; and
- 4) Appellee's accused products also lie outside the overlapping portion.









## 7. EFFECTIVE FILING DATE OF THE INVENTION CLAIMED IN THE PATENT IN SUIT

Now we can come back to our widget analogy. Suppose you have discovered that red and purple widgets cure headaches. You conclude that all widgets that have some red in them cure headaches, and this you disclose and claim.

Later on, you discover that blue and purple widgets make grass grow. You conclude that all widgets that have some blue in them make grass grow, and this you disclose and claim in a separate application on which a patent eventually issues.

Would the disclosure of headache-curing red-containing widgets in the first application be a disclosure of grass-growing blue-containing widgets just because purple widgets contain both red *and* blue and therefore are inherently (as later discovered) both a headache cure *and* a grass growing agent? Of course not. "Red-containing widgets" are just simply different things with different utility than "blue-containing widgets".

Likewise, the *group* of compositions in the area K--L--M--N, which is distinguished by the common dielectric and insulating property (i.e. having a specific electrical resistance between  $10^8$  and  $10^{10}$  ohms-cm.), is a coherent entity entirely separate and distinct from the *group* of compositions in the area A--B--C--D--E--A, whose common denominator is a square hysteresis loop. Therefore:

*If the invention of the patent in suit is a "composition of matter", the inventive "composition" is the group of compositions, as a coherent entity, defined by the area A--B--C--D--E--A of the patent. That*

*group of compositions is not disclosed by a disclosure of the group of compositions, as another and different coherent entity, defined by the area K--L--M--N of S.N. 67,752. Consequently, the effective filing date of the invention claimed in the patent in suit is October 30, 1951.*

In *Larsen Products Corp. v. Perfect Paint Products, Inc.*, 191 F. Supp. 303, 315-316 (D. Md., 1961), the same question as here arose when the plaintiff patentee sought to avoid a public use bar by going back to the parent application of her continuation-in-part patent. The court said:

“B. These claims are also barred by the public use from May 1, 1952, to April 14, 1953, of ‘Plaster-Weld’ made in accordance with the teaching of Claims 2 and 3, and used in accordance with the process claimed in Claims 4 to 8. Plaintiffs vainly seek to avoid this result by asserting that the 1954 application is a continuation-in-part of the 1952 application, and that under sec. 120 the effective date of all the claims in the patent in suit is April 11, 1952.

\* \* \* \* \*

Section 120 provides that a patentee may have the benefit of an earlier filing date if, inter alia, the earlier application contains the disclosure required by the first paragraph of sec. 112, which provides: ‘The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most clearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.’ See also Rule 118 of the Rules of Practice of the U.S. Patent

Office, 37 C.F.R. 1.118, 35 U.S.C.A. App. 1. Thus the question is whether the process claimed in Claims 4 to 8 of the patent in suit is disclosed by the April 11, 1952 application in the manner required by sec. 112.

A common feature of Claims 4 to 8 is 'drying the film' (in one instance 'permitting the film to dry'). Plaintiffs' counsel has argued that this is an essential element of the process.

\* \* \* \* \*

If 'drying the film' is an essential part of the process, as plaintiffs now contend, that element was not disclosed by the 1952 application.

\* \* \* \* \*

For the purposes we are now considering, however, the important point is not that the 1952 application was inaccurate, but that in this respect the 1952 application is so different from the 1954 statement and claims that it did not disclose in 'full, clear, concise and exact terms' the invention claimed by Claims 4 to 8 of the patent in suit.

For each of these reasons, therefore, the effective filing date of the process claims of the patent in suit is April 14, 1954, and the claims are barred by the public use of the process more than one year prior to that date. . . . 'To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation'."

### 8. EFFECT OF PAPIAN'S USE OF FERRAMIC A-34 IN 1950

W. N. Papian in 1950 was a student at M.I.T. studying for a Master of Science degree. His thesis (R. 311-394) shows, if nothing else, that sometime before August 31, 1950, he obtained bodies of Ferramic A-34 (R. 360 et seq.) and used them as square-loop devices (R. 319). Whether that use was for computer research or for commercial purposes is academic; it was an uncontrolled use by a member of the general public and hence a public use within the meaning of 35 USC 102 (b).<sup>11</sup>

Hence, the evidence below clearly shows that at least one member of the group of compositions within the area A--B--C--D--E--A was in public use *for the purpose which gives meaning to the area A--B--C--D--E--A*, more than one year prior to the effective filing date of the patent in suit.

To again use the widget analogy, a purple (blue-containing) widget was publicly used to grow grass more than a year before the application for grass-growing blue-containing widgets.

Ferramic A-34 is encompassed by Claims 1 and 3 of the patent in suit. The law is clear that an untimely publication or public use of one member of a group of compositions claimed as an entity, which discloses or uses the

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<sup>11</sup>"A person shall be entitled to a patent unless—... the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent . . ."

*Application of Blaisdell*, 242 F.2d 779, 783 (C.C.P.A. 1957), quoting *Egbert v. Lippmann*, 104 U.S. 333 (1881):

"\* \* \* If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction or injunction or secrecy, and it is so used, such use is public, even though the use and knowledge of use may be confined to one person."



property common to the group, bars any claim to the group as a whole.<sup>12</sup>

Therefore:

*Claims 1 and 3 of the patent in suit are invalid as a matter of law under 35 USC 102 (b) in view of the*

<sup>12</sup>In *Application of Perkins*, 346 F.2d 981 (C.C.P.A. 1965), one of the claims whose rejection was being appealed was of the same form as the claims involved here:

"1. A novel composition of matter characterized by excellent malleability, ductility and low work hardening, and also having resistance to oxidation and corrosion consisting essentially of between 90 and 70 percent by weight of tantalum and between 10 and 30 percent by weight of titanium."

Discussing the rejection by the Patent Office Board of Appeals of this claim on two references, the court said:

"Both references describe the preparation of alloys having compositions falling within the claimed range."

\* \* \*

"The board was somewhat more precise in phrasing the rejection, stating:

\* \* \* the properties recited in the instant claims concerning malleability, ductility, low work hardening, and oxidation and corrosion resistance, are too broad and general to distinguish the alloys. *Appellants do not deny that the alloys of the references possess the same broadly recited properties.*"

\* \* \*

"We are of the opinion that claims 1, 2 and 3 drawn to the alloy as a composition of matter were properly rejected under 35 U.S.C. §102. While appellants do not deny that the prior art discloses compositions falling within the claimed range, they rely upon other recitations in the claims. Appellants argue that by setting forth the ranges, between 10 and 30 percent by weight of titanium (claim 1) and between 4 and 15 percent by weight of titanium (claim 2), they distinguish over the art. *When the claim is directed to a composition and the prior art falls within the range, we do not feel that the arguments directed to the range can have any bearing upon a '102 rejection.'*" (Emphasis supplied)

*Application of Tanczyn*, 202 F.2d 785 (C.C.P.A. 1953), and *Rem-Cru Titanium Inc. v. Watson*, 147 F. Supp. 915 (D.C.D.C. 1957) held that similar range claims are not anticipated by a reference showing a composition within the range *when that reference fails to disclose the property* which distinguishes the range. It logically follows that range claims *are* anticipated by a reference showing a single composition within the range if the reference, as in the present case, *does* disclose the property on which the range is based.

*public use by W. N. Papian of the subject-matter thereof more than one year before the effective filing date of the patent in suit.*

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## 9. EFFECT OF THE PUBLICATIONS

Appellee contends, and the Court below agreed,<sup>13</sup> that the invention claimed in claims 1 and 3 of the patent in suit is shown in two publications each published more than a year prior to the effective filing date of the patent in suit.<sup>14</sup> The two publications are the 1949 *Electrical Manufacturing* article<sup>15</sup> co-authored by appellant's vice-president Snyder, and the Papian thesis.<sup>16</sup> The sufficiency of appellee's proof of the publication date of the latter is questioned, though not discussed, in appellant's Error Assignment No. 4, but in view of the discussion of that point in the footnote to our response to Error Assignment No. 4 (p. 6 of this brief), let us assume that it is fatally early.

Both publications undisputedly show that ferromagnetic core bodies made of a ferrite called Ferramic A-34 and made by General Ceramics and Steatite Corporation (appellant's predecessor) have a square hysteresis loop.<sup>17</sup>

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<sup>13</sup>Finding No. 21, R. 787; Findings Nos. 23, 24, R. 787-788.

<sup>14</sup>35 USC 102(b): "A person shall be entitled to a patent unless—... the invention was... described in a printed publication... more than one year prior to the date of the application for patent..."

<sup>15</sup>R. 271-276.

<sup>16</sup>R. 311-394.

<sup>17</sup>Finding 21, R. 787; see the picture of the loop of Ferramic A-34 on p. 87 of the *Electrical Manufacturing* article (R. 272, shown enlarged at R. 400); and see the Papian thesis at R. 319, R. 360, and R. 378.

Admittedly, neither publication discloses the ingredient proportions or even the ingredients (other than ferric oxide) of Ferramic A-34. Appellant contends that this is necessary to make the publications *publications of the invention*; we contend that it is not.

Back to the widget analogy: if purple widgets can be bought on the open market, and an article discloses that purple widgets make grass grow, what difference does it make to the grass-growing public what widgets are made of? The public has been taught fully and completely by that article all it needs to know: that if you want to grow grass, use purple widgets.

Likewise, both publications tell the public: If you want ferromagnetic ferrite bodies that have a square hysteresis loop, go to General Ceramics and buy Ferramic A-34. This is precisely what Papian did when he wanted a square-loop ferrite for his computer research.

Again, a publication fatal to one member of a coherent group is fatal to the entire group: *Application of Perkins*, *supra*, fn. 12 p. 29 and the discussion in that footnote.

Therefore:

*Claims 1 and 3 of the patent in suit are invalid as a matter of law under 35 USC 102 (b) in view of the publication of the subject matter thereof in the Electrical Manufacturing article and in the Papian thesis, or either of them, more than one year before the effective filing date of the patent in suit.*



## 10. INVALIDITY OF CLAIMS 2 AND 4

Claims 2 and 4 of the patent in suit are just like Claims 1 and 3, except that instead of encompassing all compositions within the area A--B--C--D--E--A, they encompass only those within the smaller area C--G--H--I--C (Fig. 2 of this brief, which is Fig. 4 of the patent in suit).

Admittedly, Ferramic A-34 is *not* within the area C--G--H--I--C, and therefore its use and publication prior to the critical date is not *directly* fatal to claims 2 and 4. Appellee contends, however, that under the applicable rules of law, the invalidity of claims 1 and 3 carries with it, under the circumstances of this case, the invalidity of claims 2 and 4.

The determinative factor in this respect is the fact that area C--G--H--I--C differs only in degree from the area A--B--C--D--E--A. In establishing this fact, it is only necessary to look at the patent in suit, because its disclosure, in order to satisfy 35 USC 112,<sup>18</sup> has to be complete in itself.

The *only* statement made in the patent in suit about the area C--G--H--I--C is:

“The preferred range of mol percentage of the components is within the area C--G--H--I--C.” (col. 3, ll. 46-47).

*Nowhere* is there any mention of why that area is preferred, or what is different about it, or how much better it

---

<sup>18</sup>“The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.”

is. As a matter of fact, the loop squareness ( $B_r/B_s$ ) of Example 5 which lies *outside* the area C--G--H--I--C is *better* than that of Example 4, which is *inside* that area. Admittedly, the squareness of Example 3, inside the area, is highest.

It is absolutely clear, however, from a comparison of the data given for each of the plotted Examples 1 through 5, that in none of the disclosed parameters are the "inside" examples (3, 4 and borderline 1) clearly different from the "outside" examples (2 and 5). What inconclusive differences there are from one example to the other are strictly matters of degree, and small degree at that.<sup>19</sup>

Coming back to the widgets, this is like saying that navy blue widgets are preferred over other blue-containing widgets; presumably because some of them grow grass a little faster, and some grow a little greener grass, than do other blue-containing widgets.

This Court has held only recently that where a broad claim is invalidated by a public use, a narrow claim that differs from the broad claim only in degree is also invalidated by the same public use, *even though* the fatal use is not directly readable on the narrow claim, in *Cataphote Corp. v. De Soto Chemical Coatings, Inc.*, 356 F. 2d 24

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<sup>19</sup>Appellant's vice-president corroborated this view in his deposition (p. 42 thereof as quoted at R. 292-293):

"Q. Do you know whether the loops of the materials that you sell today commercially are any squarer than A34, for example?

A. Oh, yes.

Q. Are they a completely different thing or are they just as a matter of degree squarer than they used to be?

A. As a matter of degree."

(1966). In that case, the District Court had held that a patent for a certain plastic highway marking composition made with styrene resin was invalid because of a public use more than one year before the application. The District Court had then held that a second patent, which had issued from a continuation-in-part of the first patent's application, and which claimed the same product made with alkyd resin instead of styrene resin, was also invalid by virtue of the public use of the analogous styrene resin composition.

In affirming the District Court's decision, this Court said (at Page 27):

"An additional charge of error is raised by appellant's challenge of the district court's finding that a highway-marking product covered by another patent number was also rendered invalid by the acts prior to the critical date. The patent application of November 12, 1957 concerned a thermoplastic composition which used a styrene resin. That application was abandoned in 1960 and was supplanted by a continuation-in-part application which included different resin ingredients (principally alkyd resin). Appellant urges that the finding of public use and sale in excess of one year prior to patent application should not have been applied to this new patentable alkyd resin product.

"We conclude this argument is untenable. The alkyd resin patent claim is clearly barred by the same public use and sale which barred the styrene resin claim. *The variation represented by the change in resin composition was not demonstrated to have entailed a patentable novelty. The variation involved was but a minor variation of the product, and added nothing which was patentable. The prior public use or sale which invalidated the patent application of*

November 12, 1957 similarly invalidated the continuation-in-part application.” (Emphasis added)

In *Greene Process Metal Co. v. Washington Iron Works*, 84 F. 2d 892 (1936), this Court held that:

“All that Greene discovered or claimed to have discovered was that, by changing the proportions of the usual slag constituents, increasing one and decreasing the other, a better result could be accomplished; this result differing only in degree from that of the prior art. Such a discovery is not patentable. (Citing cases)”

\* \* \* \* \*

“This case comes clearly within the principle, so often declared, that ‘a mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.’ (Citing cases)”

Recently, this Court cited the *Greene* decision with approval in *Locklin v. Switzer Brothers, Inc.*, 299 F. 2d 160 (1961), and went on to quote *Application of Aller*, 220 F. 2d 454, 456 (C.C.P.A. 1955):

“Normally, it is to be expected that a change in temperature, or in concentration, or in both, would be an unpatentable modification. Under some circumstances, however, changes such as these may impart patentability to a process if the particular ranges claimed produce a new and unexpected result which is different in *kind* and not merely in degree from the results of the prior art. \* \* \* Such ranges are termed ‘critical’ ranges, and the applicant has the burden of proving such criticality.”

\* \* \* \* \*

More particularly, where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the *optimum* or workable ranges by routine experimentation." (Emphasis supplied)

The Court of Customs and Patent Appeals in *Application of Rennerfelt*, 265 F. 2d 945 (1959), grounded its holding of unpatentability on this very apposite statement:

"While the claimed ratios are indicated as '*preferable*' in appellant's application, it is pointed out that the inner roller diameter need merely exceed one-fourth, and the roller thickness be less than one-fifth of the outer diameter. Thus there is no significant difference between the proportions of the reference rollers and those suggested as suitable in appellant's application. The application does not allege, and there is nothing of record to show, that there is any critical difference between the *preferred* proportions which are recited in the claims and those which are merely indicated as suitable." (Emphasis supplied)

There is nothing in the present record or in the patent in suit to show that the limitations of Claims 2 and 4 are critically different from those of Claims 1 and 3; on the contrary, *the specification of the patent in suit* clearly shows the difference to be one of arbitrary preference only. Consequently, on the holding of the *Cataphote* case, *supra*, Claims 2 and 4 must automatically fall together with Claims 1 and 3.



# 11. SUMMARY JUDGMENT IS APPROPRIATE

The Court below correctly exercised its summary judgment power under Rule 56, F.R.C.P. because there are no disputed issues of fact that could have affected the outcome of the case.

A summary judgment on a defense of public use is historically proper, as was recognized by Judge Yankwich in *Piet v. United States*, 176 F. Supp. 576, 579 (S.D. Calif. 1959):

“... the Court ordered, on June 24, 1959, a separate trial of the defense of invalidity of the patent in suit by reason of public use and sales for more than one year before the filing date of the application.

\* \* \* \* \*

“Before us is the determination of the fact whether the defense is made out. If it is, there is no issue to be tried, for, in such circumstances, even a summary judgment would be proper, as the question of validity becomes one of law . . .”

We submit that the decision of the Court below is fully and unalterably supported by the following evidence, all of which was properly before it:

- (1) The patent in suit (R. 5-9);
- (2) Application Serial No. 67,752 (R. 886-924);
- (3) The 1936 Snoek article (R. 683-704);
- (4) The 1949 *Electrical Manufacturing* article (R. 271-276); and
- (5) The Papian thesis (R. 311-394).

These papers speak for themselves; the Court below understood what they said; and nothing appellant can say can change the written word by one iota.

Appellant cites *Allegheny Ludlum Steel Corp. v. Westinghouse Electric Corp.*, 150 USPQ 95 (D.C.D.C., 1966) as an illustration of a denial of summary judgment in a similar case. Suffice it to say that in that case, Judge Holtzoff felt that the "use of the particular quantities of boron . . . and the reasons for it" went to the question of whether the specified range of boron was an invention patentable over the boron alloy as such, a matter which Judge Holtzoff felt he could not decide without expert testimony.

In the present case, however, it is *assumed* from the outset that the range of S.N. 67,752 and the range of the patent in suit are each patentable inventions in their own right. If it were otherwise, the patent in suit would be invalid over the 1936 Snoek publication. The only question is whether, as a matter of law, the original *disclosure* entitles the *claims* of the patent to the original filing date.

This is a question of law on which expert testimony is not admissible. In *Watson v. Bersworth*, 251 F. 2d 898 (C.A.D.C., 1958), the court held that issues like the one involved here were questions of *law*, not fact, to be decided on the basis of the wording of the applications involved:

"In 1946 appellees filed an application, Serial No. 657,893, which became Patent No. 2,524,218. If the disclosure in that application would have supported claims like those now in suit, had they been made



then, the doctrine of 'continuity' gives these claims the benefit of the filing date of that application and so entitles them to priority over the references. The Patent Office tribunals ruled that the 1946 disclosure would not have supported claims like these. The District Court held the contrary.

\* \* \* \* \*

The difference between the Patent Office and the District Court, and the issue before us, is not factual . . . The appellees do not contend that they are entitled to a patent if their claims are not entitled to priority over those references. The question is not whether an invention has been made. The question is whether the appellees are entitled to claim the invention. The answer turns on the relation between the words of the 1946 application and the words of the 1951 claims. And *'the words of a patent or a patent application, like the words of specific claims therein, always raise a question of law for the court and may not be determined by the opinion of experts.'* (Citing cases.) . . . The 1946 disclosure would or would not have supported claims like the ones now made, according to whether such a general disclosure does or does not, in respect to such specific claims, meet the legal requirement that 'The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such *full, clear, concise and exact terms* (emphasis in original) as to enable any person skilled in the art to which it pertains \* \* \* to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.' 35 U.S.C. Sec. 112. *'This is a question of law, open to this court, precisely as it was open to the court below.'* . . ." (Emphasis added.)

Judge Hall below felt not only perfectly competent but *compelled* to resolve that issue on the basis of the documents in the record (citing Ninth Circuit cases and quoting *Minnesota Mining & Mfg. Co. v. Carborundum Co.*, 155 F. 2d 746, 749 (C.A. 3, 1946), R. 544). Judge Hall worked hard to educate himself in the technical matters involved (Footnote 5, R. 536-537); and even though there be an occasional slip of the pen in technical parts of his opinion, it is evident that he had a thorough understanding of the matter in controversy.

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## 12. IMPORTANCE OF THE INVENTION

Appellee is not aware of any rule of law which makes the applicability of a statutory bar dependent on the commercial or scientific importance of the invention. An invention is either barred or it isn't, period, and there is no in-between. Consequently, it doesn't matter if appellant's invention is the greatest thing since the wheel, and appellant's comments in that regard (pp. 33-34 of appellant's brief) should be ignored.

**CONCLUSION**

On the basis of the above considerations, appellee respectfully submits that the decision of the Court below was in all respects correct and should be affirmed.

Dated, January 17, 1968.

Respectfully submitted,  
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**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRY G. WEISSENBERGER.



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In the  
**United States Court of Appeals**  
**For the Ninth Circuit**

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**No. 22088**

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INDIANA GENERAL CORPORATION,  
A CORPORATION, *Plaintiff-Appellant,*  
*vs.*

LOCKHEED AIRCRAFT CORPORATION,  
A CORPORATION, *Defendant-Appellee.*

---

**REPLY BRIEF FOR PLAINTIFF-APPELLANT.**

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**REPLY BRIEF FOR PLAINTIFF-APPELLANT.**

---

**Defendant-Appellee Has Presented No Law or Facts  
Disputing Plaintiff's Basic Position.**

The brief filed by Defendant-Appellee fails to come to grips with one of the principal points in this appeal. It is the position of Plaintiff that the patent in suit is entitled to the benefit of the filing date of the first application disclosing common subject matter. This point is made at pages 17 to 25 of Plaintiff's main brief, and is fully supported by the cases cited therein. Defendant takes no issue with this point. Actually, the point is incontrovertible. Both the law and the facts are certain and clear, and Defendant would be hard pressed to attempt to meet them head-on.

It is uncontroverted that Ferramic A-34 was fully dis-

closed in the 1948 application. It is also uncontroverted, and the trial court specifically found (Finding 30, R. 789), that the composition of Ferramic A-34 was continuously presented to the Patent Office from the 1948 application to and including the application which resulted in the patent in suit. Thus, even though there may be subject matter of the patent in suit which is not common with the 1948 application, at least one item of subject matter is incontestably common and that item is Ferramic A-34. Fortifying the foregoing is the fact that the specific formula for Ferramic A-34 was Example 3 in the 1948 application (on which the Court below found that Plaintiff was not entitled to rely), and was also Example 1 of the 1951 application (on which the Court below found that Plaintiff was entitled to rely). Thus, relative to Ferramic A-34, the disclosures of the 1948 and 1951 applications are identical.

On the foregoing premises, the patent in suit is entitled to the 1948 filing date insofar as Ferramic A-34 is concerned.

As the sale and publications relative to Ferramic A-34 occurred subsequent to that date, they cannot anticipate the patent in suit.

As the sale and publications relative to Ferramic A-34 was the sole ground upon which the Court below held the patent invalid, clearly this is error and should be reversed.

Inasmuch as the law and the facts on the foregoing point are perfectly clear, uncontroverted, and incontrovertible, this reply brief could end at this point. There are, however, a number of other points in Defendant's brief which are inaccurate or without reasonable basis. Accordingly, it is perhaps advisable to comment at least on the major items.

### **The 1948 Application and the Patent in Suit Do Not Disclose Distinct and Different Types of Manganese-Magnesium Ferrite Materials.**

One reading Defendant's brief would assume that the first filed (1948) application disclosed one group of manganese-magnesium ferrites having a number of properties, that the patent in suit disclosed a totally different group of manganese-magnesium ferrites having totally different properties, and that some time more than one year prior to the earliest date on which the patent in suit can rely there was a complete disclosure of the last-named group.

These are not the facts. The manganese-magnesium ferrites disclosed in the 1948 application possessed a number of characteristics or properties, including those quoted in Defendant's brief on pages 22 and 23, i.e., magnetic, insulating, and dielectric properties, and as set out in Finding 11 (R. 784) high resistivity. The manganese-magnesium ferrites disclosed in the patent in suit have these same properties. They are magnetic materials, they have insulating properties, they have high resistivity, and they have dielectric properties. (Findings 9 and 11, R. 784). In addition to the foregoing properties, the manganese-magnesium ferrites of the patent in suit possess a square hysteresis loop, as did some of the ferrites in the 1948 application. Furthermore, the two groups of manganese-magnesium ferrites are not separate and distinct, but clearly overlap. (See diagram facing page 24 of Defendant's brief.) Significantly, Ferramic A-34 lies in the area of overlap.\* (Finding 31, R. 789.)

Defendant dwells at some length on the proposition that the range of the 1948 application is different than the

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\* Defendant argues on page 21 of its brief, that the invention of the patent in suit is not Ferramic A-34, but is "a coherent group" of ferrites. If Ferramic A-34 is not the invention, how then can a disclosure or sale of Ferramic A-34 anticipate the invention?

range of the patent in suit, and that therefore the patent in suit cannot rely on the 1948 application. This argument overlooks the obvious point that the sale and publication found by the Court below to invalidate the patent in suit was of a specific manganese-magnesium ferrite material not a range of such materials, and the specific manganese-magnesium ferrite material was disclosed in the 1948 application.

Actually, the position taken by the Defendant as mentioned in the foregoing paragraph is contrary to the position taken by the Court below. The Court below concluded (Conclusion 4, R. 790) that the patent in suit is entitled to rely on the filing date of the second-filed (1951) application. The range of ingredients disclosed in the second-filed application is different than the range of ingredients of the patent in suit. Thus, the Court below did not believe it to be necessary that the range be identical, and in fact, neither does the Defendant as it also concedes that the patent in suit is entitled to rely on at least the filing date of the second-filed application.

Actually, the Trial Court decided this case on the basis of nondisclosure of a **use** not on nondisclosure of a composition or a range of proportions.

The 1951 application on which the Court below found (and the Defendant concedes) Plaintiff **is** entitled to rely, specifically described the composition Ferramic A-34 and disclosed a range of proportions different from the range of the patent in suit.

The 1948 application, on which the Court below found (and the Defendant argues) Plaintiff **is not** entitled to rely, specifically described the composition Ferramic A-34 and disclosed a range of proportions different from the range of the patent in suit.

The basis on which the Trial Court refused to give the



patent the benefit of the 1948 filing date is found in Finding 34 (R. 389), which reads as follows:

“34. Since application Serial No. 67,752 did not disclose the square hysteresis loop properties of the magnesium-manganese ferrite material **therein disclosed** nor the use thereof in a computer, the patent in suit is not entitled to the filing date of such application.” (Emphasis added.)

The above-quoted Finding clearly demonstrates the Court's position. The magnesium-manganese ferrite **material** was amply disclosed in the 1948 application, but one of its properties and a specific use were not. The missing property was first described in the 1951 application. This the trial court felt was the fatal defect. Such is not the law. The simple discovery of a new use is not a patentable invention, and the failure to list all possible uses is not a fatal defect.

### **The Claims Are Not Invalid on Their Face.**

On page 17 of Defendant's brief, Defendant quotes what it asserts to be claim 1 of the patent in suit with the reference to square hysteresis loop removed. Claim 1 of the patent in suit reads as follows:

1. A fired ferromagnetic ferrite body **having a square hysteresis loop** consisting essentially of a manganese-magnesium ferrite and consisting essentially of 8-55 mol percent of magnesia, 4-67 mol percent of manganese oxide and from 25 to about 47.5 mol percent of ferric oxide, the proportions of said components being within the (area) A—B—C—D—E—A of Fig. 4 of the drawing.

The only portion of the claim relating to square hysteresis loop has been printed in bold face, and if that is removed, **the full limitations of the claim still remain.** The range described by the claim is not shown in the prior art, and

certainly not in the Snoek article. The Defendant does not contend otherwise and the Court specifically found that the Snoek article did not disclose the range of the patent in suit. (Finding 28, R. 788.)

Defendant itself apparently has some doubt as to the soundness of the Court's findings and conclusions below to the effect that the patent in suit is invalid because of the prior publications and sale of Ferramic A-34. At pages 17-19 of its brief Defendant argues that the Snoek article is prior art and as such would invalidate the patent. In the first place, the Court below did not so find. No part of the Court's judgment was to the effect that the Snoek article invalidated the patent in suit. Furthermore, all the Snoek article showed was that magnesium and manganese could be mixed together to form a compound and the Court below specifically found that the ranges of the 1948 application and the patent in suit **are not disclosed in the Snoek article.**

**The "Sale" and "Publications" on Which the Trial Court Relied Do Not Invalidate the Patent in Suit.**

Disregarding for the moment the clear position of Plaintiff that it is entitled to rely on the date of the 1948 application, even if Plaintiff were not so entitled, the sale and publications do not clearly bar the patent in suit.

The sale of Ferramic A-34 was for the purposes specified in the 1948 application. (Finding 20, R. 787.) Thus, if, as the Defendant contends and the Trial Court found, the invention is for a group of manganese-magnesium ferrite materials for use in square hysteresis loop applications, the sale in 1949 would not anticipate.

The publication, ELECTRICAL MANUFACTURING, merely showed a picture of a hysteresis loop of A-34, not specifying the ingredient proportions, and certainly not disclosing any group of manganese-magnesium ferrites.



The Papian thesis similarly disclosed neither the chemical composition of Ferramic A-34, nor disclosed any group of manganese-magnesium ferrites. Defendant concedes the absence (in the publications) of any disclosure of composition or range. (D's Brief, p. 31.) Furthermore, the availability of the Papian thesis as a "publication" is clearly in doubt, the affidavit in the record (R. 308) being by the **present** librarian, and indicating that under **present** procedures a paper so filed would probably be available in about two weeks. If the present procedure had been followed when the Papian thesis was filed, it would have been available as a "publication" in the period from October 16 to October 19, 1950. The second application of Dr. Albers-Schoenberg was filed on October 30, 1951. Thus, if the availability of the Papian thesis was delayed but a few days, it would not be a proper reference. No proof whatsoever was presented except the affidavit of the present librarian, and that affidavit does not even indicate that the present librarian was even there in 1950.

Defendant's remark on page 6 of its brief that Plaintiff is "stuck" with the inferences to be drawn from the librarian's affidavit is clearly wrong. Patents are not stricken down by inference, and the proof of prior publication must be such as to overcome the statutory presumption of validity.

## **The Defendant Concedes That a New Use Is Not Patentable.**

The basis for the decision of the Court below is clearly set forth in its finding that the invention of the patent in suit is the discovery of the **new use** of the manganese-magnesium material. This basis is found in Finding 34, (R. 789) which reads as follows:

“34. Since application Serial No. 67,752 did not disclose the square hysteresis loop properties of the magnesium-manganese ferrite material therein disclosed nor the use thereof in a computer, the patent in suit is not entitled to the filing date of such application.”

This is a misconception of the patent laws, a misconception clearly pointed out in Plaintiff's main brief. On page 17 of Defendant's brief, **Defendant specifically concedes** that a **new use** of an old thing **cannot be patented** unless it is claimed as a process (which is not the case here). Thus, in effect, the Defendant concedes that the basic premise of the decision of the Court below was wrong.

## **THERE IS NO BASIS FOR THE FINDING THAT CLAIMS 2 AND 4 DIFFER FROM CLAIMS 1 AND 3 ONLY IN DEGREE.**

The court below struck down claims 2 and 4, not on the basis of any prior sale or publication, but on the basis that they differ only in degree from claims 1 and 3 and hence fall with claims 1 and 3.

There is no evidence whatsoever to support such a finding.

The testimony of Mr. Snyder is quoted in the footnote on page 33 of Defendant's brief. This apparently is the testimony on which the court based its decision, and from a reading thereof it is obvious that the witness was referring **not** to the chemical compositions of the materials of claims

2 and 4, but rather to the degree of squareness of the loop produced thereby. Obviously, a similarity of result does not mean similarity of product. The hysteresis loops of the manganese-magnesium ferrite materials involved in the patent in suit could be identical with the hysteresis loops produced by the old fashioned laminated metal magnets, but there is a world of difference between the ferrites of the patent in suit and the old fashioned magnets. It should be noted that the case cited by the Defendant at this portion of its brief (p. 33,) *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 356 F. 2d 24, is one where the decision was reached after a full, complete trial.

Defendant's argument (Brief p. 36) that there is nothing in the record to show that the range of claims 2 and 4 is "critically different" than those of claims 1 and 3 carries no weight whatsoever. The Patent Office found the claims were sufficiently different as to warrant their issue, and the patent being presumptively valid the burden is on the Defendant to show that they are **not** critically different, rather than on the Plaintiff to show that they are.

In this regard it is interesting to note that while the Defendant asserts that the range of claims 2 and 4 is not critical, the fact is that the accused material manufactured by Defendant falls precisely in the range of claims 2 and 4, (R. 60; Point Q on Chart attached to Finding 15, R. 785.) As a matter of fact, the Defendant mixes some zinc oxide in with the manganese-magnesium ferrite material, and only claim 4 of the claims in suit calls for the addition of zinc oxide.

**CONCLUSION.**

The only "prior art" involved in the proceedings thus far is the material Ferramic A-34, the sale of which and the publications concerning which were held by the court below to invalidate the patent in suit. As this specific material was disclosed in a 1948 application which is the parent of the patent in suit, it is subject matter common to both and under the law the patent in suit is entitled to rely on the 1948 filing date at least insofar as Ferramic A-34 is concerned. As the sale and publications all occurred after 1948, the patent in suit is not anticipated. The position of the court below that a new use is patentable, and that the use in a computer of Ferramic A-34 was not disclosed in the 1948 application thereby preventing that application from being a proper parent of the patent in suit, is in error. The judgment below should be reversed.

Respectfully submitted,

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## CERTIFICATE.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....  
WILLIAM J. STELLMAN,



No. 22091

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United States  
Court of Appeals  
for the Ninth Circuit

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SMITH CANNING & FREEZING CO.,  
a corporation,

*Appellant,*

v.

LLOYD KRAUSE, INC., a corporation,

*Appellee.*

---

**APPELLANT'S BRIEF**

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*Appeal from the United States District Court  
for the District of Oregon*

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SEP 13 1967

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United States  
Court of Appeals  
for the Ninth Circuit

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SMITH CANNING & FREEZING CO.,  
a corporation,

*Appellant,*

v.

LLOYD KRAUSE, INC., a corporation,

*Appellee.*

---

**APPELLANT'S BRIEF**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**JURISDICTIONAL STATEMENT**

This is a civil action for recovery of money, brought by appellee. The District Court had jurisdiction on the basis of diversity of citizenship and that the amount in controversy exceeded \$10,000. (28 U.S.C. § 1332).

Appellee is a Washington corporation and its principal place of business is in the State of Washington. Appellant is an Oregon corporation with its principal place of business in the State of Oregon. (R. 2).

The cause was originally commenced in the state court in the State of Washington but was removed to the United States District Court for the Eastern District of Washington. Thereafter, on motion for change of venue, the cause was transferred to the United States District Court for the District of Oregon. (R. 2).

This court has jurisdiction of this appeal pursuant to the provisions of 28 U.S.C. § 1291.

### STATEMENT OF THE CASE

This appeal is taken from the judgment (R. 30) which held appellant liable to appellee for certain amounts for hauling services during each of the harvest seasons for the years 1960 through 1965 inclusive.

Appellant is a processor of green peas which are used for canning and freezing. Its processing operations are located in Umatilla County, Oregon. The peas are raised on large fields and the harvesting period is in the months of June and July.

During the years 1960 through 1965, the harvesting process required that when the green peas in the pod reached the degree of maturity desired, the peavines were cut off at the ground and swathed into windrows. The peavines were then loaded into trucks by mechanical loaders which raised the vines into the trucks. The trucks then carried the vines to a vining station. There the loads were dumped and the vines

fed into a machine called a viner which separated the green peas from the pods and vines. (TR. 34, 35, 49).

The testimony showed that the hauling of green peavines was not the type of operation which a common carrier could undertake. The standard truck used in the hauling of peas is a two ton truck, (TR. 50) which is a much smaller vehicle than the large over the road trucks used by common carriers. The pea harvesting season covers a period of about five or six weeks during the year, and many trucks are needed during this harvesting season. The truckers who are engaged in this line of hauling must follow the harvest in order to keep their trucks working, and the Krause trucks were used in California and Washington. (TR. 51).

Time is extremely critical in the processing of peas. Green peas are very perishable, and it is essential in the processing that the trucks be available at the moment they are needed to move the peas from the field to the vining station and to the processing plant. (TR. 54).

Mr. Stoddard, manager of appellant, testified:

“Q (By Mr. Fabre) Is this a continuing hauling process in hauling the peas from the field after they are transported to the vining station?

“A Yes, continuing from the time we start the harvesting.

“Q Are there times when the trucks are there available and nothing to haul?

“A Yes. Some days, we might have ten trucks; the next day, we might have forty trucks in use.

“Q What determines this? What determines the need for the trucks?

“A The maturity of the peas; the time they happen to mature in the field. We have to cut them at certain stages. These peas are real perishable. And, there has to be an expeditious way, within an hour or so, from the field to the plant or the vining station so that they don't spoil.” (TR. 54).

The relationship between the parties commenced when Mr. Krause came to the appellant and offered to haul the peas for appellant on an hourly basis. (TR. 52). Other processors either leased or owned their own trucks, and the rate at which appellee was engaged to haul peas was generally higher than the rate at which trucks could be leased.

Mr. Stoddard testified, (TR. 53), that the rate claimed by appellee in this litigation would put appellant out of competition with other processors. As it was, appellant was generally paying a little more for its hauling services than other processors. (TR. 53).

Appellee was engaged by appellant as a contract carrier, (R. 2), and the first season that appellee hauled was 1957 and the hauling arrangements continued

for nine seasons. (TR. 33). The ninth season was the year 1965, and at the conclusion of that season, and for the first time in their relationship, appellee demanded additional compensation for his hauling services. (TR. 59; Ex. 39).

On a few occasions there had been some discussion between the parties as to whether a road haul or field haul rate should be applied in a particular instance, but no dissatisfaction or dissent from the rates paid to appellee had been expressed in the nine years of hauling, (TR. 57-59) until the demand letter of August 9, 1965, (Ex 39) which came after the 1965 season was concluded. This appears from the following testimony given by Mr. Stoddard, manager of appellant, in response to questions by the court, (TR. 37):

"Mr. Stoddard, did Mr. Krause ever say to you in the middle of the season, 'I want you to pay me the balance owed at the end of the season?'"

"THE WITNESS: No, he never did.

"THE COURT: Did he ever make a demand upon you for any additional money?"

"THE WITNESS: He never did until we received this letter in August of 1965.

"THE COURT: How many years was that after you started to do the work?"

"THE WITNESS: That was the end of the ninth season."



The additional compensation claimed by appellee in this action is \$66,593.28, for his hauling services, for the total of the years 1960 through 1965. (R. 3). (Claims for years prior to 1960 would be barred by the Statute of Limitations.)

During the hauling season, appellee prepared billings for appellant so that there was a weekly settlement of accounts. Each Monday these billings were prepared by an employee of appellee, (Ex. 7, pp. 28-29; Ex. 10), and submitted to appellant. These statements were examined and audited by an employee of appellant. (Ex. 9).

Each of the weekly statements prepared by appellee during the period involved is in evidence. (Ex. 31, 32, 33, 34, 35 and 36). These exhibits included cancelled checks of appellant in payment of the statements so rendered and the checks showed endorsement by appellee and cancellation and payment by the bank on which they were drawn.

The trial court questioned Mr. Stoddard about these payments, (TR. 59):

“THE COURT: After you gave him his check from week to week, did he, except on those two or three instances, accept the payments, and was he satisfied with it as far as you know?

“THE WITNESS: As far as I know, he was.

"THE Court: He did not make any complaint?

"THE WITNESS: No."

In the beginning of their relationship, the parties recognized that as a contract hauler for appellant, appellee would need a permit from the Public Utilities Commissioner of the State of Oregon. (TR. 36; Ex. 7 pp. 11, 12). Oregon Statutes require that a contract carrier file with the Public Utilities Commissioner a copy of his hauling contract. (ORS 767.420 (3) and Exhibit 1-6, with the exception of Exhibit 2 which applied to the year 1961, were filed with the Commissioner. Before a permit is issued to a contract carrier, the Commissioner examines and reviews that contract. (TR. 8).

The parties had agreed upon a rate for the hauling of the peavines. When the contract which specified the agreed rate was submitted to the Public Utilities Commissioner, the rate was not acceptable to the Commissioner. (TR. 36). The Commissioner would only approve a higher rate than the parties agreed upon, and so a new writing was prepared which set forth the acceptable rate. (TR. 8-10, 36). The writings which include this acceptable rate are Exhibits 1 through 6, and are in evidence. Appellee's action is based on these exhibits.



The Appellee undertook, however, to haul appellant's peavines at the rate originally set by the agreement of the parties. This is shown by the billings made, payments made to appellee, and the acceptance thereof in full satisfaction of appellant's obligation.

Resistance to appellee's claim was asserted by appellant on grounds summarized briefly as follows, (R. 6-8) :

(1) That the writings in evidence as Exhibit 1 through 6 are not the real contracts between the parties as to the rates for hauling appellant's peavines.

(2) That appellee was paid in full for its hauling services in the amounts appellee claimed to be due in accordance with itemized billings prepared by appellee and submitted to appellant every week during the time appellee was hauling for appellant, and that appellant has fully performed.

(3) That appellee accepted the payments made on its itemized billings weekly (Ex. 31-36), and has acquiesced in appellant's performance and payments and waived any further performance, and is estopped to demand any further performance from appellant.

(4) That the rates set forth in Exhibits 1 through 6 are not enforceable against appellant since the Public Utilities Commissioner has no authority to fix rates for the contract hauling of **agricultural products**,

under the circumstances of this case as provided by ORS § 767.420 (4), which states:

“(4) The Commissioner has jurisdiction over said rates, fares, charges and practices to the same extent as is required by ORS 767.410, in the case of common carriers, and ORS 767.410 is by this reference made applicable to contract carriers and the Commissioner shall apply and enforce the same accordingly; provided, the Commissioner has no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the transportation from the point of origin to packing or processing plants, or from the point of origin or from packing or processing plants to the nearest market or shipping points, when not transported in competition with common carriers or railroads.”

The trial court's decision (R. 26) was that appellant was liable. His conclusion was that the oral evidence may not be considered which denies the validity of a writing, if the writing was executed to defraud or mislead a third person. (R. 28) The trial court held that the written instruments (Ex. 1-6) must be enforced and that the oral evidence of appellant's manager would vary the effect of those documents and that such evidence was not therefore to be considered.

The trial court acknowledged that he was convinced that Mr. Stoddard, the appellant's manager, was telling the truth with regard to his testimony con-

cerning the relationship between the parties. (TR. 38). The trial court further admitted sympathy for the position of the appellant, (TR. 53), and indicated his decision was a windfall to the appellee, and unnecessarily harsh to the appellant. (R. 28). Perhaps these comments by the trial court would mean that he felt justice was with the appellant, but the law was not.

Appellant contends that the trial court's opinion and order, (R. 26), which serve as findings of fact and conclusions of law, (R. 29), is in error and that judgment should have been entered for appellant on the trial.

### **SPECIFICATIONS OF ERRORS**

The District Court erred in making its findings of fact and conclusions of law and in entering judgment for the appellee in the following particulars:

1. The court failed to hold that the written instruments forming the basis of appellee's claims were not the true and actual agreements of the parties.

2. The court failed to hold that under the provisions of ORS 767.420 (4) the Public Utility Commissioner of the State of Oregon during the years here in question had no authority to fix rates for the hauling of green peavines from the fields to appellant's vining stations and processing plants because said hauling

was not in competition with any common carrier or railroad.

3. In holding that the parol evidence rule requires that the testimony of Mr. Stoddard, appellant's manager, to the effect that the written instruments, Exhibits 1-6, which formed the basis of appellee's action, were not the true and actual agreements of the parties, was inadmissible.

4. In holding that the written instruments, Exhibits 1-6, were valid.

5. In failing to hold that validity of the written instruments, Exhibits 1-6, is here the fact in dispute and that parol evidence is admissible to determine the validity of the instrument as the agreement between the parties.

6. In failing to hold that parol evidence is admissible to show discharge, performance, release or abrogation of a written contract, and to show payment of an obligation or its discharge by accord and satisfaction or by account stated, and that parol evidence is further admissible to show waiver and estoppel.

7. In failing to hold that during the pea harvesting and processing seasons here involved, appellant paid appellee weekly the agreed compensation for its hauling services and that appellant fully performed its contracts with appellee for the hauling of green pea-

vines during said years.

8. That during said years, appellant paid appellee the compensation to which appellee was entitled each week based on the itemized statements furnished by appellee to appellant and appellee fully accepted and acquiesced in appellant's said performance of said contracts during the years here involved and thereby waived any further performance thereof on the part of appellant and by reason thereof appellee is estopped to demand any further performance of said contracts on the part of appellant.

### SUMMARY OF ARGUMENT

The argument in support of the specification of errors will be divided generally into three categories, namely, the authority of the Public Utilities Commissioner to prescribe the hauling rates, the effect of the parol evidence rule, and the discharge of the obligation of appellant.

Appellant's position is that there was no authority on the part of the Commissioner to prescribe the rates to be charged for the hauling under the Oregon statutes, and that acts of the Commissioner fixing the rates are without legal substance and are void. The appellee hauler therefore would have no right to claim additional compensation for hauling appellant's prod-



ucts based on the rates fixed by the Commissioner, but must be satisfied with the rates agreed upon between the parties.

Appellant further contends that the parol evidence rule does not apply in this case to prevent a showing of the true agreement between the parties, since the validity of the writings, (Exhibit 1-6), is the question in this case. The parol evidence rule furnished the sole reason for the trial court's decision, which held that no evidence could be received contrary to the written instruments because it is claimed that the parties intended to use the writings to mislead the Commissioner as to the rates charged. But, as will be pointed out more fully in the argument, the Commissioner legally has no interest or concern with the rates charged in this case and if there was any misleading, it was certainly an immaterial matter.

It is finally the argument of appellant that, even assuming that the instruments sued on are binding, which appellant does not admit, any obligation of the appellant was fully satisfied by the payment to the appellee hauler of the full amount claimed to be due, without reservation of rights or any showing of dissatisfaction as to the rates. The act of appellee in billing appellant for the hauling services and the joint auditing and adjusting of the claims would constitute

an account stated between the parties. The amount of the account stated was paid thereby discharging the appellant from any further obligation to appellee.

### ARGUMENT

#### **The Authority of the Public Utilities Commissioner to Prescribe the Hauling Rates**

In this case, the appellee sought to recover for hauling services as a contract carrier for appellant, based upon a rate for such hauling services prescribed by the Public Utilities Commissioner of the State of Oregon. The pre-trial order, (R. 5) acknowledges that it is the difference between the commissioner's rate and the rate actually paid which is the amount in dispute.

The statutory scheme in Oregon, (ORS Ch. 767), for the regulation of motor carriers is not unlike that which generally prevails in this country. A carrier is classified and regulated as a common carrier, contract carrier or private carrier, depending upon the particular circumstances. The rates for hauling services for common carriers and contract carriers are regulated excepting in certain instances which have a direct bearing on this case.

The documents which are Exhibits 1 through 6, and which were admitted into evidence, while in the form of a contract, were not the result of negotiations between the parties, but the rates for hauling therein



stated were dictated by the Public Utilities Commissioner. Mr. Singleton, from the office of the Commissioner, testified that his department reviewed and approved the rates, (TR. 9, 10), but Stoddard, for appellant, testified that the rates which the parties specified were not acceptable to the Commissioner, (TR. 36) so that another document was prepared for the Commissioner with rates therein mentioned which were acceptable.

The rates sued for in this action are therefore rates which have been imposed on the parties by the Commissioner. It must then be first decided whether the Commissioner has any right to impose any rate, whatever it is, upon the parties for the services to be performed.

The parties agreed that appellee was a contract carrier. (R. 5). The only authority by which the rates of a contract carrier can be regulated is ORS 767.420 (4) which provides:

“The Commissioner has jurisdiction over said rates, fares, charges and practices to the same extent as is required by ORS 767.410, in the case of common carriers, and ORS 767.410 is by this reference made applicable to contract carriers and the Commissioner shall apply and enforce the same accordingly; provided, the Commissioner has no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the trans-

portation from the point of origin to packing or processing plants, or from the point of origin or from packing or processing plants to the nearest market or shipping points, when not transported in competition with common carriers or railroads."

The section referred to relating to common carriers, (ORS 767.410), and which is incorporated into ORS 767.420 (4), permits the Commissioner to fix, declare and prescribe the rates that the carrier is to charge.

We are here concerned with the proviso in ORS 767.420 (4), quoted above, which exempts from the Commissioner's rate fixing authority agricultural products, where the transportation thereof is not in competition with common carriers or railroads.

Appellee attempted to show at the trial that the hauling of peavines for appellant was in competition with common carriers. (The parties in the pre trial order had agreed that none of the hauling was in competition with a railroad. R. 4). Appellee offered evidence that the Public Utilities Commissioner considered competition within the meaning of ORS 767.420 (4) to mean

" \* \* \* those common carriers possessing the operating authority to perform the service proposed to be performed by the contract carrier under consideration.

"Q Those common carriers would then be deemed competition?

"A Yes, sir." (TR. 16)

Mr. Singleton further testified on cross axamination:

"We consider, sir, that any common carrier possessing the authority to do what the contract carrier proposes to do is competition. He is a common carrier and has the duty and responsibility to perform, if called upon, by any shipper, for the service-for comparable service." (TR. 17).

The parties agreed (R. 4) that during the years in question, no common carrier actually hauled any green peavines from fields to vining stations or processing plants. Mr. Krause testified (Ex. 7, pp. 34, 35) that no other hauler was equipped to haul peavines for appellants.

Mr. Stoddard, for appellant, testified as to the manner and circumstances employed in the hauling of green peavines. (TR. 48-54). He explained the nature of the equipment and the need that the trucks be available for hauling peas to the viner for processing at the time when the correct degree of maturity had been reached by the peas. There was no common carrier who was equipped to haul peavines, according to Mr. Stoddard, and the only practical way of providing for the appellant's hauling needs in harvesting and processing the peas was by means of an arrangement with

a contract carrier.

Attached to the pre-trial order are exhibits setting out the operating authority of various common carriers, (R. 11-25), many of which include the authority to carry general commodities. Authority to haul general commodities includes authority to haul green peavines, according to Mr. Singleton. (TR. 25-26).

Appellee contends that since there were carriers who had authority as common carriers to haul general commodities, there was by this fact alone, competition from such common carriers in the hauling of green peavines. This assertion is made even though admittedly no common carrier hauled or was equipped to haul green peavines, and there was no evidence of any common carrier offering or holding itself out as willing to haul green peavines.

The reasoning behind this assertion apparently is based on the assumption that a common carrier is obligated to haul any goods included in his permit authority of any person requesting services of the carrier. Therefore any pea processor could call on any common carrier having authority to haul general commodities and expect to be served by such carrier, regardless of whether the carrier was equipped to haul peavines or wanted to do so, or had ever hauled peavines before. It is apparently claimed that as long as

the carrier's permit authority allows him to compete for hauling peavines, then he is under a legal duty to compete.

It is submitted that the determination of whether a carrier has a duty to receive and transport goods of a shipper depends not on the authority the carrier has, but upon the holding out by the carrier as to the types and kinds of goods that he will haul. While it is true that under present law, a common carrier cannot legally operate without a permit, his duty to the shipper is not determined by the permit he has, issued by an administrative agency, but his duty is imposed by law.

The Oregon law ORS 767.005 (5) (a) defines a common carrier as:

“Any person who transports for hire or who holds himself out to the public as willing to transport for hire, compensation or consideration by motor vehicle, persons or property, or both, for those who may choose to employ him.”

This statute does not define a common carrier in any terms relative to the permit he has. The concept of the common carrier existed at common law, before any attempt was made at government regulation. The duties of such carriers are common law duties unless changed by statute, and there is no Oregon statute found which requires a common carrier to haul that which he does not hold himself out to the public as



willing to haul.

The duty of the carrier to transport the shipper's products was a duty existing at common law. Judge Fee in *Montgomery Ward & Co. vs. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (DC Or 1953), stated that carrier's obligation to the shipper in the following language:

"Now, at common law a carrier was obligated to accept and transport all commodities which it held itself out to transport for hire, whenever such commodities were tendered to or accepted by it, on nondiscriminatory terms." 128 F. Supp. at 490.

The *Montgomery Ward Co.* case was an action by a shipper against several carriers for breach of the duty of the carriers to receive, carry and deliver goods. The carriers were held liable, not because they had permit authority to transport the goods in question, but because the carriers held themselves out as carriers of the goods tendered, and were liable if they did not accept and carry the goods.

In *Bowles vs. Wieter*, 65 F. Supp. 359, (DC ED 111, 1946.), the carrier had general commodity authority but limited its business to the hauling of milk from farms to a dairy. He hauled no other commodities. The question was whether the hauler was a common carrier and entitled to be exempt from the pro-

visions of the Emergency Price Control Act, where the hauler was seeking an increase in his rates. The court held that the nature of the hauler's business was such that he was a common carrier, even though limiting himself as to the kinds of property which he held himself out as willing to haul. The fact that the hauler had general commodity authority did not compel him to haul all types of commodities.

In *Miles vs. Enumclaw Cooperative Creamery Corp.*, 12 Wash. 2d 377, 121 P2d 945, (1942) plaintiff's action was to recover for hauling at rates authorized for a common carrier to charge for the hauling involved, although the hauler had in fact made a contract with the shipper to haul for rates equal to about one-half the common carrier rate. At the time such contract was made, the carrier had no common carrier authority, but subsequently applied for and was granted a common carrier permit. The court held that the action was not maintainable because, even though the hauler had a common carrier permit, he was not conducting his business as a common carrier, but as a contract hauler. There was no holding out as a common carrier.

The court in *Pfister vs. Central Pac. R. Co.*, 70 Cal 169, 11 P 686, (1886), had before it the question of the duty of a railroad as a common carrier in trans-



porting property. The court stated:

“A common carrier of goods is not under obligation to accept and carry all personal property that may be offered. That class of carriers known as ‘transfer companies,’ engaged in receiving and transferring the baggage of passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is provided by our Code, to accepting and carrying property *‘of a kind that he undertakes or is accustomed to carry.’* 11 P at 690.

In *Anderson vs. Smith-Powers Logging Co.*, 71 Or 276, 139 P 736, (1914) the court described and defined a common carrier and its duties, stating, “It is not necessary that he carry both passengers and freight, or that he carry all kinds of freight.” 71 Or at 283.

To the same effect is *Oswego, D & R Ry. Co. vs. Cobb*, 66 Or 587, 593 - 595, 135 P 181, 183, (1913); *Pacific Spruce Corporation vs. McCoy*, 294 F 711, (DC Or, 1923), affirmed in *McCoy vs. Pacific Spruce Corporation*, 1 F2d 853, (CCA 9, 1924); *Director General of Railroads vs. Viscose Company*, 254 US 498, 41 S CT 151, 65 L Ed 372, (1921); *Ace-High Dresses, Inc.*,

vs. J. C. Trucking Co., Inc., 122 Conn 578, 191 A 536, (1937); Alabama Great Southern R. Co. vs. Herring, 234 Ala 238, 174 So 502, (1937); State vs. Rosenstein, 217 Iowa 985, 252 NW 251, (1934); US vs. Smith, 215 F2d 217, (CCA 6, 1954); Olive Kent Park vs. Moshassuck Transportation Co., 71 NYS2d 15, 189 Misc 864, Aff'd 80 NYS2d 729, 274 App Div 765 (. . . .); Austin Fireproof Warehouse Transfer Co. vs. Faltinson, 144 SW2d 905, (Tex. 1940).

Whether a transportation agency is a common carrier depends not on its corporate character or declared purposes, but on what it does. U.S. vs. State of California, 297 US 175, 56 S CT 421, 80 L Ed 567, (1936).

It is what the carrier does that counts and not what it is authorized to do. McKay vs. Public Utilities Commission, 104 Colo 402, 91 P2d 965, (1939); Tausig vs. Moffat Tunnel Water and Development Co., 106 Colo 384, 106 P2d 363, (1940); Phillips vs. Public Service Commission, 127 Pa Super 341, 191 A 641, (1937).

Previous reference has been made to the necessity of special equipment and trucks in the hauling of peavines. Unless the carrier holds out to the public that it is willing to haul commodities requiring special handling, it has no duty to receive and transport such

commodities.

An analogy can be drawn from decisions concerning the duty of common carriers by railroad to furnish tank cars for hauling the products of its shippers. Apparently most of these cars are actually owned and furnished by the shipper and not the railroad.

In *U.S. vs. Pennsylvania R. Co.*, 242 US 208, 37 Sup Ct 95, 61 L Ed 251, (1916), the Interstate Commerce Commission entered an administrative order requiring the railroad to furnish sufficient tank cars for use of certain shippers. This suit was to enjoin the enforcement of the order. It was the practice of those shippers using tank cars to own their own tank cars, although the railroad also owned some tank cars. The order in question would have required the railroad to acquire additional tank cars.

The court held that the Interstate Commerce Act, as amended, required that a carrier furnish cars upon reasonable request, but this means such cars as the carrier had. It gave no authority to the Commission to require tank cars or any other type of car. The duty of the carrier in this regard was the same as at common law, namely, to furnish such cars and equipment for all the business it undertakes and advertises it will do. The jurisdiction to enforce any duty to furnish such equipment is not with the administrative agen-

cy, but with the courts through suits for damages and similar proceedings by the shipper for breach of the duty to furnish the transportation facilities.

A similar case, *St. Louis & S.F.R. Co. vs. State*, 76 Okla 60, 184 P 442, (1919), concluded that a railroad had no duty to furnish special types of cars, such as a tank car, which was of a different kind than that normally or usually furnished for transportation.

A point not to be overlooked in the railway tank car cases is that where the matter concerns the duty of the carrier to furnish special equipment, or the duty to accept, an unusual type of commodity for transportation, the remedy is with the courts under common law principles, unless specific authority would be given to the administrative agency to deal with that matter. Thus the agency, the Commissioner in our case, would have no right or authority to compel a carrier to haul peavines. If there is a duty under the law for the carrier to transport peavines as a common carrier, which it would not have unless it held itself out as willing to haul peavines, the remedy for the breach of that duty would be with the shipper.

It is therefore apparent in the case at bar that the issuance of a permit by the Commissioner authorizing a carrier to haul all classes of commodities, does not compel or require the carrier to do so. It is not the per-



mit of the Commissioner which sets the extent of the duty of the carrier to the shipper. It is the holding out by the carrier as to the types and kinds of commodities he will haul that determines what duty he has to shippers. Where the carrier holds itself out as willing to haul a commodity, and then refuses, the shipper is the proper person to seek the remedy.

The authority or permit, of itself, does not constitute competition with other carriers unless the carrier goes further and holds itself out to the public as willing to haul particular commodities. Operating authority to haul general commodities cannot, without a further holding out to the public of a willingness to haul green peavines, result in the existence of competition with appellee in this case.

In the case at bar, we find that there was no holding out on the part of any common carrier that it would haul peavines as a common carrier indiscriminately for all persons. It is clear that no common carrier was in the business of hauling green peavines and no common carrier hauled any such green peavines.

Competition implies rivalry, or the act of two persons seeking the same result, that is the business of another. It implies an active rivalry. Without such competition or rivalry between the appellee and common carriers for the business of hauling green peavines, it

is clear that the Public Utilities Commissioner has no right to fix the contract hauling rates for green peavines, according to the proviso in ORS 767.420 (4).

It is a basic principle of administrative law that the agency has only such jurisdiction or authority as is conferred upon it by the Legislature. The agency can act only where it is authorized to act. An attempt by an administrative agency to act in an area where it has no authority is void and of no force or authority. *McCarthy vs. Coos Timber Co.*, 208 Or 371, 391, 302 P2d 238, (1956); *Safeway Stores vs. State Board of Agriculture*, 198 Or 43, 69, 255 P2d 564, (1953); *Gouge vs. David*, 185 Or 437, 459, 202 P2d 489, (1949); *State, ex rel Peterson vs. Martin*, 180 Or 459, 176 P2d 636, (1947); *Fred Meyer, Inc. vs. Keasey*, 145 Or 266, 27 P2d 311, (1933).

If we strip aside the form of the dealings between the parties, we find a case where the Commissioner was attempting, through the contract between the parties to regulate the hauling rates. The Commissioner must issue a permit to contract haulers before they can legally pursue their hauling, but the issuance of the permit was in this case made to depend upon conforming with the rates specified by the Commissioner. This the Commissioner had no right to require.

Since the Commissioner had no legal authority un-

der the statute to fix the rates as between the parties, the appellee's efforts here to recover on a rate having no real basis in law should be rejected.

### **The Parol Evidence Rule**

The trial court's decision in this case was based solely on his interpretation and application of rules derived from Oregon cases which, it is claimed, hold that in the circumstances here, parol evidence should not be admitted which might vary the terms of the so called agreements, which are Exhibits 1-6. The rule in the cases relied upon is stated to be that the court cannot consider oral evidence denying the validity of the written memorial of the parties, when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third person. *Kergil v. Central Oregon Fir Supply Co.*, 213 Or 168, 189, 323 P2d 947, 948, (1958).

In the *Kergil* case, the plaintiff hauler brought an action to recover the amount claimed due on a written lease of trucks for hauling defendant's lumber. The defense was that the written lease of the trucks was not intended as a valid agreement, but was a pretended agreement, and that the true agreement was an oral one that the hauling was to be a stated price per thousand board feet. The purpose of the written agreements was to permit the same to be filed with the Public Util-



ities Commissioner of Oregon because where the document filed showed a lease of equipment the shipper would be exempt from a 3 per cent federal transport tax. (26 USCA 141, Internal Revenue Code, § 4291).

The defendant shipper in the Kergil case therefore benefited primarily from the written lease agreement, by being enabled thereby to avoid the transport tax. The plaintiff hauler, although presumably aware of the purpose of the lease, was not avoiding or evading any tax liability, although if the hauler was a contract carrier he would be required to collect the amount thereof from the shipper.

Distinctions exist between the case at bar and the Kergil case, which makes Kergil inapplicable. In our case the written instruments (Ex's 1-6) had no result of avoiding or evading any law or duty which would have been imposed on the parties and particularly the appellant shipper, if the written instruments had not been made. Whatever the parties here agreed upon, they were not attempting to avoid any tax, nor any other duty or law imposed upon the parties, and in particular upon the appellant as a shipper.

The trial court based its application of the Kergil rule on the conclusion that the written agreements were designed to mislead or defraud the Public Utilities Commissioner. The alleged misleading was in re-

gard to the rates charged. (R. 28).

It is clear from our discussion of the meaning and effect of ORS 767.420 (4), above, that the Commissioner is not legally entitled to be concerned about the rates charged in the hauling of agricultural products, where, as here, there was no competition from a common carrier. The Commissioner is specifically instructed by the Legislature to stay out of rate fixing under the circumstances here. No misleading or fraud can exist regarding a matter which is immaterial or on which one is not entitled to act or rely.

It is suggested in the trial court's opinion that if the parties *believed* that the Commissioner had the authority to fix the rates, then the legal consequences are the same as if the Commissioner did in fact have such power. (R.28). However, it is a familiar rule of law that if both contracting parties are mistaken about the existence of material matters under which a contract is entered into, the agreement can be voided. 17 CJS, Contracts, § 144, page 894. So in this case the mutual belief by the parties that the Commissioner has certain authority, when in fact he does not, cannot prejudice the parties, or prevent the determination of their rights in accordance with the true situation.

If the parties did believe in the Commissioner's authority, they were induced to do so by the Commis-

sioner, (Tr. 36), who refused to approve the contract unless his rates were used.

It would be assumed that a trucker would be more familiar with the requirements and authority of the Commissioner than would a shipper, such as appellant, who has no reason to deal regularly with the Commission.

Mr. Stoddard for appellant testified that he had no knowledge about the workings of the Commissioner, (Tr. 52), and relied to a large extent upon Mr. Krause's knowledge of the hauling business and the practices of the Commissioner. It would appear that appellant was the one who was misled.

The Kergil rule is drawn from 9 Wigmore on Evidence, p. 16 § 2406, which does not condemn every so-called sham agreement, but only those agreements where the intention of the parties is morally unjustified. However, it would be considered morally justified to prepare a sham agreement for such a purpose as "to calm a lunatic or to console a dying person." 213 Or at 190, 323 P2d at 949.

It is not the fact only that there is a sham agreement that caused the court concern in the Kergil case. But the purpose for which such agreement was prepared seems to be the true test of whether it should be given effect, under the Kergil rule.

As we have pointed out, we have no evasion of any law or true deception of any party, because the only matter about which there is any claim of pretense is in the rates, and under the facts in this case the Commissioner is specifically told by the Legislature that he has no authority to fix or regulate the rates. Just as the Commissioner could not specify the brand of gasoline the trucker was to use, so the Commissioner cannot specify the rates. The Kergil rule is not applicable in this case.

In a recent case the Oregon Supreme Court has cast much doubt upon it holding in **Kergil**, and it is submitted that there is doubt that the Oregon court would extend the Kergil rule or even now follow it.

This recent case is *Story v. Hamaker*, 84 Or. Adv. Sh. 145, 423 P2d 185, (1967). In that case the defendant's decedent as seller, executed a land sale contract to plaintiff as buyer which required a down payment of \$10,000. The evidence was admitted which showed that this contract was in fact a sham, since the seller wanted to use the contract in order for the plaintiff buyer to obtain from the State Department of Veterans Affairs a loan on the property, and then when the loan was obtained the plaintiff was to reconvey to the seller. The seller had acknowledged to the Department that he made a gift to plaintiff of \$8,000 to make the



down payment along with \$2,000 which the plaintiff claimed to have paid.

The action was by the plaintiff to recover the \$10,000 claimed as the down payment, since the contract was not completed because a third party had and exercised an option for the purchase of the property. Plaintiff knew about the option.

The plaintiff claimed that the testimony about the sham agreement and that no gift from seller to plaintiff was made or intended, was parol evidence and should not have been received. On this matter the court stated:

“The statute itself (ORS 41.740, the parol evidence rule) provides that the bar against the admission of parol evidence to vary a writing is not applicable ‘where the validity of the agreement is the fact in dispute.’ This is the fact in dispute here” 84 OR. Adv. Sh. at 147, 423 P2d at 186.

The court then concluded that there was no valid agreement between the parties and the parties had no meeting of the minds, and there was no intention to sell the property to the plaintiff. A judgment for defendant was affirmed.

In the Story case, there was a sham agreement and the parties, and particularly the seller, intended by this agreement to mislead a State agency for the purpose of obtaining a loan. If the Oregon court was

wholly dedicated to the Kergil rule, the Story case was one where it should have been applied. But when the loan was not completed because of the sale of the property to a third party the court could readily find that the agreement was not binding. The State Veterans Agency was not in fact misled because the property was sold without the need for the loan.

Our case is more like the Story case than like **Kergil**. The incorrect loan application in **Story** was not in fact misleading, because it did not come before the agency for official action. The information as to the rates in our case was in fact not misleading because the Commissioner was not entitled to take any official action with regard to those rates. In the Kergil case, considering the whole arrangement the parties had, the parties and particularly the defendant shipper, were attempting to evade a law which imposed a tax. There is an element of the *in pari delecto* concept here where the court will not lend its aid to evade the law by holding the written lease invalid. In our case, no evasion of the law is promoted by holding that the Commissioner's rates are not collectible here and were not the rates actually agreed upon.

The Kergil case was not specifically overruled in Story vs. Hamaker nor did the court discuss the Kergil rule or distinguish the case. The court in the Story

case based its decision upon the plain wording of the parol evidence rule as stated in ORS 41.740:

**“Parol Evidence Rule.** When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain in ambiguity intrinsic or extrinsic, or to establish illegality or fraud. The term ‘agreement’ includes deeds and wills as well as contracts between parties.”

It is interesting to note that in the *Kergil* case, the court specifically indicated that the question for decision and the fact which was in dispute was the validity of the lease agreement. Under Oregon’s parol evidence rule just quoted where the validity of the agreement is in dispute, parol evidence can be employed to determine validity. The agreement is thus not varied or changed, but shown not exist at all. The court in its opinion in *Kergil* does not explain how it could disregard the parol evidence as to the validity of the lease agreements in the face of the language under Oregon’s parol evidence rule.



We therefore submit under this phase of the case that it is the validity of the instruments on which appellee brings its action that is the fact in dispute here. Under the plain meaning of the statute, ORS 41.740, hereinabove set forth, the court is clearly justified in determining the matter of the validity of the agreement by the use of evidence other than the terms set forth in the writing itself, as the Oregon court did in the Story case. We therefore submit that the parol evidence rule does not aid the appellee in this case.

It should be noted in considering the application of the Kergil rule, that Exhibit 2, which covered the year 1961, was not filed with the Commissioner by appellee. (TR 8, 16, 27-29). If, as the trial court held, the parties misled the Commissioner as to the rates to be charged from the terms of Exhibit 1-6, such misleading could not have applied to Exhibit 2 for the year 1961, which the Commissioner did not see. If he did not see it, he could hardly have been misled thereby.

The Kergil case considered only the application of parol evidence in relation to establishing the original agreement between the parties. The court there did not at all consider whether events occurring subsequent to the making of the written lease agreements had any effect to alter the contractual relationship between the parties.

We submit that under the parol evidence rule, ORS 41.740, above quoted, the subsequent acts of the parties affecting and bearing upon their contractual relationship can be shown, and such evidence may be by parol. The proscription on parol evidence applies only to the terms of the original agreement and to matters which are prior and contemporaneous with the original agreement. *Taylor vs. Wells*, 188 Or 648, 217 P2d 236, (1950).

But when considering matters regarding modification, discharge, performance, release or abrogation of a written contract, oral evidence may be admissible. *Lease vs. Corvallis Sand and Gravel Co.*, 185 F2d 570, (CCA 9, 1951); *Ahlquist vs. Alaska-Portland Packers Association*, 39 F2d 348, (CCA 9, 1930); *Kontz vs. B. P. John Furniture Corp.*, 167 Or 187, 115 P2d 319, (1941); *Craswell vs. Biggs*, 160 Or 547, 86 P2d 71, (1939); *20th Century Lites vs. Goodman*, 64 CA2d 938, 149 P2d 88, (1944); *Haumeder vs. Lipsett*, 90 CA2d 167, 202 P2d 819, (1949); *Selimos vs. Marinos*, 323 Ill App 144, 54 NE2d 836, (1944); *United States S.S. Co. vs. Allied S.S. Corporation*, 255 F 537, (CCA 2, 1918); *Haberman vs. Sawall*, 72 CA 576, 237 P 776, (1925); *Arsenio vs. Smith*, 50 CA 173, 194 P 756, (1920).

Parol evidence is also admissible to show payment

of an obligation or its discharge by accord and satisfaction, and to show waiver and estoppel. First National Bank vs. Brown (Tex) 111 SW2d 806, (1937) Rev'd on other grounds, 134 Tex 38, 131 SW2d 558, (1939); Griswold vs. Frame, 48 CA 178, 191 P 962, (1920); Bu-Vi-Bar Petroleum Corporation vs. Krow, 47 F2d 1065, (CCA 10, 1931); Katz vs. Haskell, 196 CA 2d 144, 16 Cal Rep 453; Boshes vs. Miller, 119 CA 2d 332, 259, P2d 447, (1953).

We therefore submit that the Story case is the guiding precedent to be applied in this case for the purpose of determining the validity of the instruments upon which the appellee brings its action. It is the validity of those writings as agreements which is the fact in dispute in this case and there is under such circumstances no limitation on the right to use evidence outside the writing to determine the true intent and agreement of the parties. We also contend that the subsequent conduct of the parties in modifying, performing and discharging the contract which actually existed between the parties can be shown and that there is no limitation imposed by the parol evidence rule on the presentation of such facts.

### **Discharge of Appellant's Obligation**

There is in evidence (Exhibits 31-36) statements prepared by appellee hauler for each week during the

entire period in question in this case showing the charges made by appellee for the weeks hauling. These exhibits include the checks showing payment of the amounts demanded in the statement. Mr. Stoddard testified (Tr. 37, 59) and it is undisputed in the testimony, that during the nine years of hauling for appellant, Mr. Krause never made any demand for additional money or claimed any dissatisfaction with the hauling payments made until August, 1965, shortly before this action was commenced.

Appellant's position is that appellee has been paid in full in accordance with statements submitted by appellee, and that appellee has accepted these payments as being in full for its services and has waived any further performance by appellant and is estopped to demand any further performance.

The representatives of the parties met each Monday morning during the hauling season to settle their accounts. (Tr. 66). At these meetings the itemized statements were presented to appellant, and adjustment made if necessary as between the rates for a field haul or a road haul. The statements then, as adjusted, were paid by the checks which are in evidence. (Exhibits 31-36).

Even if it be assumed that the written instruments, Exhibits 1 through 6, originally expressed the agree-



ment of the parties as to the rate to be paid to appellee, it is clear that the subsequent payment to and receipt by appellee of the amounts requested, constituted a joint departure from the terms of the original agreement, and that such terms in the original agreement are abrogated to that extent. In *re Swindle*, 188 F Supp 601, 604 (DC Or, 1960); *Mathis vs. Thunderbird Villages, Inc.*, 236 Or 425, 438, 389 P2d 343, 349, (1964); *Kontz vs. B. P. John Furniture Corp.*, 167 Or 187, 205, 115 P2d 319, 326, (1941); *City Messenger Co. vs. Postal Telegraph Co.*, 74 Or 433, 441, 145 P 657, 659, (1915).

The figures arrived at between the parties at their regular Monday morning meetings would amount to an account stated between the parties. The result was a discharge of appellant's duty under the contract when the amount claimed in the account stated between the parties was paid.

In *Sunshine Dairy vs. Jolly Joan*, 234 Or 84, 85, 380 P2d 637, 638, (1963), the court stated:

“ ‘An account stated is an agreement between persons who have had previous transactions of a monetary character fixing the amount due in respect to such transaction and promising payment: \* \* \*’ *Steinmetz vs. Grennon*, 106 Or 625, 634, 212 P 532.

“The cruz of an account stated is an agreement between the parties that a certain amount

is owing and will be paid." 234 Or at 85, 380 P2d at 638.

In *State ex rel Kaser vs. Leonard*, 164 Or 579, 94 P2d 1113, 102 P2d, 97, (1940), the plaintiffs brought action for wages claimed to be due them. The work for which the wages was claimed was highway construction where the rates to be paid the workers in various job classifications and categories was specified by the United States Bureau of Public Roads. The claims of plaintiffs were based on alleged discrepancies between what was paid and what should have been paid according to the job classifications. The court found that every week when the plaintiffs were paid, they examined the time keepers records and then satisfied themselves that they were receiving the full amount due. The court held that each week there was an account stated for the preceding week's labor. The amount found due was paid, and that disposed of the matter. Judgment was directed to be entered for defendant.

An account stated effects a discharge of an obligation or contract according to Restatement of Contracts, § 422. Subsection (1) of that section states:

"Matured debts are discharged by a manifestation of assent in good faith by debtor and creditor to a stated sum as an accurate compu-

tation of the amount of the matured debt or debts due the creditor, or if there are cross demands as the amount of the difference between indebtness due the other party. A new duty arises to pay a sum so fixed."

The comment to this section reads:

"a — Such an agreement as is within the rule stated in the Section is called an account stated. It must be founded on previous transactions creating the relationship of debtor and creditor. An unliquidated sum due as compensation for breach of any other duty than a money debt cannot be discharged in the way stated in the Section. The distinction is not, however, of great practical importance since the recognition of the possibility of an executory accord operating if so intended as an immediate discharge of a previous claim.

"b — The validity of an account stated does not depend upon any uncertainty as to the existence or amount of the antecedent claims since the stated sum is supposed to be fixed, primarily, by way of computation rather than compromise.

"c — It is not essential that an account shall be stated in a particular form. Any evidence indicating assent by a debtor to his creditor that a stated amount is that due the creditor, is ground for implying a promise by the debtor. Expressed statements are not essential; inferences from conduct are enough. So that retention of a statement of account without objection for more than a reasonable time, implies consent to its correctness. Though it is usually



the creditor who submits a statement of account, it may be the debtor.”

It is apparent that the conduct of the parties in this case in settling the hauling charges from week to week fits squarely within the rules of an account stated as set forth in the Restatement of Contracts above quoted. When the appellee retains the proceeds of the checks which were given to it in payment of its charges, without objection for more than a reasonable time, it certainly implies consent on the part of the appellee to the correctness of the payment.

The circumstances in this case are also very much akin to the situation where the parties to an agreement set about to discharge the obligations under the contract and agree on what is necessary in order to discharge such obligation and that performance is accepted in full discharge of the contract. A valid and executed accord and satisfaction is thereby accomplished and the contractual obligations must be considered as discharged. The effect of a valid accord and satisfaction is stated by the Oregon court in *Brady vs. Selberg*, 154 Or 477, 60 P2d 1104 (1936) in the following language:

“To constitute a valid accord and satisfaction it is also essential that what is given or agreed to be performed shall be offered as a satisfaction and extinction of the original demand; and

the debtor shall intend it as a satisfaction of such obligation, and that such intention shall be made known to the creditor in some unmistakable manner. It is equally essential that the creditor shall have accepted it with the intention that it should operate as a satisfaction. Both the giving and the acceptance in satisfaction are essential elements, and if they be lacking there can be no accord and satisfaction. The intention of the parties, which is of course controlling, must be determined from all the circumstances attending the transaction." 154 Or at 479.

A party to a contract may waive any term of the contract which is for his benefit, and this, if agreed to and acquiesced in by the other party, modifies the contract accordingly. *James vs. Ward*, 96 Or 667, 675, 190 P 1105, 1107, (1920).

A waiver is the voluntary relinquishment of a known right of a party and a waiver may be shown by the acts of that party or by such party accepting benefits accruing on account of the waiver. *Widing vs. Jensen*, Real Estate Comm., 231 Or 541, 547, 373 P2d 661, 664, (1962); *Cross vs. Campbell*, 173 Or 477, 493, 146 P2d 83, 89, (1944); *Smith vs. Martin*, 94 Or 132, 138, 185 P 236, 238, (1919). Certainly when appellee each Monday billed appellant for hauling services for the previous week, and received payment of the amount, there can be no doubt but that any alleged rights for additional compensation were waived. Proof

of the waiver is clear and convincing because of the admitted acceptance by appellee of the payments requested.

## CONCLUSION

The aim and purpose of any legal system ought to be the securing of justice as between the conflicting rights and claims of the parties. The protection of legal rights should be distinguished from mere legalism. The judicial process, of course, is not just a mechanical application of certain formalized rules to a certain situation, but the application of legal principles with discretion born of experience and the philosophy of the law.

In this case we discern no real justice in appellee's claims. Appellee has not offered any justification for its assertion that it is entitled to \$66,593.28 from appellant, excepting a rule which, it says, prevents appellant from showing the true facts. But the appellee was paid for its hauling every week, and the amount it requested was paid and was accepted. It now demands more.

If the American concept of justice for all can be given practical effect, this is the case for it. Justice in this cause would compel a holding that appellee has willingly and knowingly accepted full payment for

all its hauling for appellant and is entitled to nothing more. The judgment of the District Court should be reversed and this cause dismissed.

Respectfully submitted,  
FABRE, COLLINS & EHLERS  
Attorneys for appellant

**CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: \_\_\_\_\_ day of \_\_\_\_\_ 1967

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Of Attorneys for Appellant



United States  
**Court of Appeals**  
for the Ninth Circuit

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SMITH CANNING & FREEZING CO.,  
a corporation,

*Appellant,*

v.

LLOYD KRAUSE, INC., a corporation,

*Appellee.*

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**APPELLEE'S BRIEF**

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*Appeal from the United States District Court  
for the District of Oregon*

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FILED

OCT 9 1967

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**United States  
Court of Appeals  
for the Ninth Circuit**

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SMITH CANNING & FREEZING CO.,  
a corporation,

*Appellant,*

v.

LLOYD KRAUSE, INC., a corporation,

*Appellee.*

---

**APPELLEE'S BRIEF**

---

*Appeal from the United States District Court  
for the District of Oregon*

---

**COUNTER - STATEMENT OF CASE**

Appellee brought suit upon six written contracts covering the hauling of pea vines by the appellee as a contract carrier for the appellant shipper during the years 1960 through 1965, inclusive.

Said written contracts were submitted to the Oregon Public Utilities Commission as required by law, with the knowledge and concurrence of the appellant. See Exhibit 8, Stoddard deposition, p. 8, line 24 to p. 9, line 5:

Q I think we can agree, can we not, Mr. Stoddard, that all of the contracts from 1960 through 1965 were, to your knowledge, submitted to, and approved by, the Public Utilities Commission of the State of Oregon, particularly with reference to the hourly rates?

A Well, I am sure this is the case. *To my knowledge they had to be filed.* (Emphasis supplied.)

The written contracts submitted were approved by the Public Utilities Commission after the hauling rate that had been established by the commission had been set forth in the contracts (Tr. 10, line 4).

The appellee was paid for the hauling at a rate less than the contract-specified and approved rate, and appellee sued for the difference for the years 1960 through 1965, inclusive.

It was the appellee's position that the Public Utilities Commission had authority to require compliance with rates previously established for common carriers, and the rate, once established and inserted into the contract between the parties, became the only rate that appellee could charge and the rate appellant was required to pay in order to comply with the declared public policy of the state of Oregon to prevent rate discrimination between common and contract carriers.

Appellant challenged the authority of the Oregon Public Utilities Commission to prescribe rates as between

the parties and offered to show by parol evidence another alleged contract between the parties contending that it had been discharged.

The offered evidence was admitted provisionally (Tr. 34, line 2) by the trial court, but ruled inadmissible in the opinion and order (R. 26, p. 3, line 5), and judgment was entered in favor of the appellee in the agreed sum of \$66,593.28, plus interest.

Appellant's contention that no common carrier had trucks that could haul pea vines is not substantiated by the record. Tr. 50, line 20, the court asked Mr. Stoddard:

THE COURT: Except for the number of trucks that you would need, why couldn't Sites come out to your location and with the mechanical loader, why couldn't you load his trucks with these pea vines?

THE WITNESS: Well, in the first place, he doesn't have the size of the trucks.

THE COURT: He doesn't have the two-ton trucks?

THE WITNESS: He doesn't have this size of truck that I *know about*. (Emphasis supplied).

Appellant's contention that the billings by appellee and the payments made show an acceptance in full satisfaction of appellant's obligation is likewise not substantiated by the record. The Stoddard deposition (Ex. 8) at page 9 acknowledged that each statement showed a "difference" between the rate paid and the Public Utilities Commission rate, as is demonstrated by Exhibit 12 itself.

## SUMMARY OF ARGUMENT

Appellee's argument in support of the trial court's judgment, opinion and order will be considered under the following subdivisions:

1. The Public Utilities Commissioner had authority to prescribe hauling rates for contract haulers;
2. The commissioner's determination of competition is not subject to collateral attack;
3. The Public Utilities Commissioner having established the hauling rate, there can be no defense to nonpayment thereof;
4. The parol evidence rule bans oral evidence denying the validity of a written contract executed with the intent of misleading a third party;
5. The legal doctrines of modification, discharge, performance or release are not applicable.

Appellee contends that the appellant and appellee entered into a written contract for the avowed purpose of securing the approval of the Oregon Public Utilities Commissioner to rates set forth therein. The Public Utilities Commissioner, acting under the provisions of ORS 767.420 (4)<sup>1</sup>, correctly interpreted the word "competition" as used therein to mean that hauling proposed to be done under the written contracts would be in competition with

1. See appendix p. 67

common carriers who had been previously licensed to haul the same commodity, and he prescribed the approved contract carrier rate.

The commissioner having made an administrative determination of competition and prescribed the rate, his determination is not subject to collateral attack.

Where parties have entered into a written contract and submitted it to a third party for approval, with the intention that it will be relied upon, the parol evidence rule prevents the introduction of oral evidence that it was not the true agreement of the parties.

By the overwhelming weight of authority, once a hauling rate is officially established, there can be no defense to nonpayment, including fraud, estoppel, mistake, part-payment, discharge or modification.

### **ARGUMENT**

#### **The Public Utilities Commissioner Had Authority to Prescribe Hauling Rates for Contract Haulers.**

Implicit in the trial judge's opinion and order is a finding that the Public Utilities Commissioner had authority to require appellee as a contract carrier to charge the approved contract carrier rate for the hauling in question. (R. 26, p. 4.)

During the trial, the trial court repeatedly stated that the crux of the case was whether or not the commissioner

had authority to establish rates under ORS 767.420 (4) (Tr. 41, 45).

It is therefore necessary to consider the statutes under which the commissioner determined that there was competition under ORS 767.420(4) and required the hauling to be done at the approved rate.

The public policy of the state of Oregon in relation to motor carriers is set forth in ORS 767.020<sup>2</sup>. It provides that the business of operating as a motor carrier is affected with the public interest, and regulated competition is in the public interest to the end, among other things, that discrimination in rates be eliminated.

Hauling can only be done by common carriers and contract carriers after a permit has been secured on application submitted to the commissioner. ORS 767.105<sup>3</sup>. It is required in the application that there shall be set forth the ownership, financial condition, equipment to be used, whether the transportation is to be of persons or of property, and the territory to be served. ORS 767.125<sup>4</sup>.

It would seem to follow that if a carrier can only haul after a permit has issued on application in which there must be set forth the equipment owned and the territory to be served, then there is a "holding out as a matter of law" that if the permit is granted, the appli-

2. See appendix p. 63

3. See appendix p. 64

4. See appendix p. 65



cant will perform the services for which he applies. This is borne out by the provisions of ORS 767.190 (e) and (f) <sup>5</sup> which provide for permit cancellation if the carrier has refused or failed to furnish services authorized by his permit, except for reasons beyond his control. In addition, ORS 767.470<sup>6</sup> provides for civil penalties if a carrier violates any of the provisions of ORS 767.

Under the provisions of ORC 767.420<sup>7</sup> the commissioner is given the same supervisory and regulatory powers over contract carriers as common carriers. The contract carrier is required to file any contract for hauling immediately with the commissioner and cannot haul until the contract has been approved. The reason for this requirement as set forth in subsection (2) is to prevent unfair competition or any situation which would injure or destroy the business of any common carrier or the integrity of the state's regulation of the business of any common carrier.

In light of the foregoing statutory provisions, it is necessary to consider the proviso on the commissioner's authority to prescribe rates in contracts of contract carriers, contained in ORS 767.420(4).

It seems clear that the commissioner, under subparagraph (4) of ORS 767.420, is delegated the duty of making

5. See appendix p. 65

6. See appendix p. 67

7. See appendix p. 66



an administrative decision as to whether or not a contract carrier is to haul in competition with common carriers who have previously secured permit authority to haul the same commodity or commodities.

Appellant contends that the commissioner was without authority because of the contention that the commissioner was required to find actual competition with common carriers.

The commissioner is the only one qualified and required to make such an administrative decision because of the provisions of ORS 767.125. No carrier, whether contract or common, can haul without a permit and the approval of the commissioner, and the commissioner has on file in his official records the permits of all carriers and can determine from the permits on file whether the application of a contract carrier is in competition with like permit authority of any and all common carriers, the extent of any previously-authorized permit, routes to be traveled, products to be carried, and, of course, rates to be charged.

It is appellee's contention that the only reasonable interpretation of "competition" as used in ORS 767.420(4) is that it means competition with permit authority previously authorized to common carriers. To construe it to mean actual competition would produce a rather ironic result.

If the commissioner determined, on the day of application by a contract carrier, that there was no actual competition and therefore he was without authority to prescribe the approved contract rate, and the contract carrier agreed with the shipper to haul a given commodity for \$1 per ton and the next day a common carrier commenced to haul the same commodity at \$2 per ton (upon request by a shipper), public policy of regulated competition would be destroyed.

In this connection it is important to note what the commissioner did in the case at issue concerning competing permittees and competition. Mr. Singleton, who was the Director of Transportation for the State of Oregon, testified in response to question by Mr. Corey (Tr. 8-20):

Q I see. Could you tell Judge Solomon what administrative functions were involved in your examination of those contracts relative to their approval or rejection?

A Each contract is initially reviewed for the purpose of ascertaining if the transportation proposed to be carried by the contract is within the area the carrier serves or proposes to serve; that the commodities to be transported are within the operating authority as issued by the Commissioner or proposed to be issued by the Commissioner to the carrier either in service or proposed to enter in service.

Another function is then to ascertain if the proposed carrier was in competition with other common carriers.

Q Do you make a determination relative to that?  
Did you in these instances?

A Yes, sir.

Q Did you conclude there was competition with  
other common carriers?

A Yes.

Q With other common carriers?

A Yes.

. . .

Q Did you, in the case of Krause and Smith Canning Company contracts, make any determination as to the propriety of the rates specified in those contracts referring to hauling rates?

A That's what we do on review as related to common carriers to see whether the proposed rates and services were consistent with the requirements set out in our statute.

Q Did the office of the Public Utility Commissioner in fact approve the rates of the contracts that were submitted?

A Yes, they did — he did.

THE COURT: You said you reviewed them for the rates and services to determine whether they were consistent with the State standards of the Oregon statutes; is that correct?

THE WITNESS: The statutes as they relate to the contract carriers' contracts as opposed to common carrier tariff.

THE COURT: What was that standard? Did you require that they be competitive with common carriers or that they not be much lower than the common carrier rates, so as not to prejudice the common carriers, or what was the standard?

THE WITNESS: May I read from our statute?

THE COURT: Yes.

THE WITNESS: This is ORS 767.420(2), which says:

“No contract carrier shall give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with patrons of any common carrier, or subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage, or by unfair competition destroy or impair the service or business of any common carrier or the integrity of the state’s regulation of any such service or business.”

THE COURT: How did you construe that?

THE WITNESS: We construed that, and have consistently, insofar as my memory serves me, since 1933, as meaning competition.

THE COURT: In other words, let me just take an example. If a contract carrier wanted to enter into a contract, say for ten cents a ton mile and the common carrier was charging 20 cents a ton mile, what would you do?

THE WITNESS: We would disapprove the contract.

THE COURT: Suppose that instead, the common carrier was charging 20 cents and the contract car-

rier wanted to charge 30 cents, what would you do?

THE WITNESS: Then, we would approve the contract.

THE COURT: You would approve the contract?

THE WITNESS: Right.

THE COURT: In other words, you didn't want to destroy the common carrier?

THE WITNESS: That's correct. We consider the common carrier as the rate making carrier.

THE COURT: You wouldn't permit any contract carrier to undercut the common carrier to such a degree as to make it impossible for the common carrier to operate?

THE WITNESS: That's correct.

THE COURT: What did you regard as the common carrier within the county, and what county are we talking about?

THE WITNESS: Umatilla County.

THE COURT: What is the common carrier in Umatilla County?

THE WITNESS: Well, a common carrier there in Umatilla County is the same as any other place in the State of Oregon. It's one who holds himself out to serve the public for those who want to engage his services.

THE COURT: This Plaintiff was carrying pea vines, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Do you certificate carriers for Umatilla County?

THE WITNESS: Yes.

THE COURT: Only for Umatilla County?

THE WITNESS: Some for only Umatilla County and some for the entire State of Oregon. There's some for Multnomah County only.

THE COURT: Are there some common carriers who have unlimited certification?

THE WITNESS: Yes, sir.

THE COURT: In Umatilla County, at this time, were there any common carriers who had limited certification for pea vines?

THE WITNESS: Yes, there were.

THE COURT: There were?

THE WITNESS: Yes.

THE COURT: Can you tell us who they were and what period of time they held their certification?

MR. FABRE: Your Honor, may we cover Union County also?

THE COURT: Mr. Corey, perhaps you were going to cover these matters. But I thought I would ask Mr. Singleton these things in which I am very interested.

MR. COREY: All right.



THE WITNESS: If I might comment on Union County, I believe my reading of the permit authority of Krause is that it does not authorize any transportation from, to, or within Union County.

There is one called Fitchett Truck Lines. Their head office is in Ontario, Oregon.

THE COURT: What are they certificated for?

THE WITNESS: Insofar as Umatilla County is concerned, they are certificated for general commodity, unrestricted.

Then, there is Luisi Truck Lines, whose headquarters was in Milton-Freewater, Oregon.

Sites Silver Wheel Freightlines, their authority is unrestricted throughout the state.

Sunset Trucking Company of Pendleton, Oregon, their authority is within, from and to Umatilla County.

There is a Henry L. Campbell, who has the same authority as Sunset Trucking.

The Pendleton Brothers Transfer of Pendleton, Oregon, their authority is the same, within, from and to Umatilla County.

We have a Hermiston Transfer and Storage Company, they have general commodities without restriction within Umatilla County.

Now, those are the — I will refresh myself with these notes — those are the ones that mention Umatilla specifically.

THE COURT: All of those are unrestricted, aren't they?



THE WITNESS: With the exception of Luisi Truck Lines. They are restricted on time basis, April 1st, of each year to September 30th of each year, and within Umatilla County, and on fresh and dried peas, grain, farm equipment. I'm unable to specifically locate it now; but there are three different Luisi's permits. Some of them are specifically limited to peas, vines and peas on the vines.

THE COURT: That was in Union County?

THE WITNESS: Umatilla County.

THE COURT: Did they also have authority in Union County, or don't you know?

THE WITNESS: I'm sorry. I can't answer that for you.

THE COURT: Do you have any carriers who were limited to just pea vines?

THE WITNESS: I can't answer within any specifics.

THE COURT: People who had general authority could carry pea vines, couldn't they?

THE WITNESS: Yes, sir

THE COURT: That is unrestricted authority?

THE WITNESS: Yes.

THE COURT: Can you tell me the rate for pea vines?

THE WITNESS: No, sir.

THE COURT: Are there any rates for pea vines?

THE WITNESS: There are tariff rates for them. Tariff is quite voluminous. There are two rates, yes.

THE COURT: When you approved Krause's contract with Smith Canning and Freezing Company, did you check those tariff rates to see if the rates charged by Krause were consistent with the standards of the statute?

THE WITNESS: Those proposed to be charged by Krause, yes.

THE COURT: Go ahead.

Q (By Mr. Corey) Just one other area of inquiry, Mr. Singleton; what, in your interpretation, constitutes competition within the language of the statute which we have been concerned with here, ORS 767.420 Subsection 4?

A Historically, we consider competition to mean those common carriers possessing the operating authority to perform the service proposed to be performed by the contract carrier under consideration.

Q Those common carriers would then be deemed competition?

A Yes, sir.

. . .

### CROSS - EXAMINATION

BY MR. FABRE:

. . .

Q What you have said here is your office — the

PUC has no interest of any actual competition in these areas that we are talking about?

A I don't understand what you mean. I'm not arguing; I'd like to have it cleared up.

Q Assuming that competition means actual rivalry for something, say for the business of the hauling that's involved here of Smith Canning and Freezing Company, in that sense, is your office interested or has it made any of its determinations based upon actual competition?

A We consider, sir, that any common carrier possessing the authority to do what the contract carrier proposes to do is competition. He is a common carrier and has the duty and responsibility to perform, if called upon, by any shipper, for the service — for comparable service.

Q Well, actually, are you saying that you are not interested in whether there is any actual competition between someone such as Mr. Krause or Krause, Inc. applying for the permits, as he did, to contract the hauling for Smith Canning and Freezing Company? That got a little bit involved. Do you understand what I mean by actual competition?

A I will have to put it in a little different language, perhaps, Mr. Fabre.

A common carrier is obligated, it's his responsibility and duty to serve those who call upon him for service in the area, and on the commodity which is in his authority to transport. Now, if a carrier, so qualified is requested by Smith Canning and Freezing Company to perform this service, he is obligated by law to perform the service.

Q I still would like for you to try to answer the question if you can, Mr. Singleton. Assuming that competition — now, is actual rivalry —

THE COURT: Actual what?

MR. FABRE: Rivalry for the business—

THE COURT: Don't you think you are arguing a question of law with the witness? Isn't that something for me to determine, not for Mr. Singleton to determine? He has made his position clear. He said that a common carrier who has unrestricted authority in Umatilla County is required to haul pea vines if and when Smith Canning and Freezing Company calls upon it to furnish service. He is not saying any of these trucking firms were in fact ever called upon by Smith Canning or any other growers to haul pea vines. He is just saying that under the law, they have to do it; and he regards that as competition.

MR. FABRE: Well, I think I understand very clearly that's determinative of the issue in this case, anything that he said. I would like to know just what they did.

THE COURT: He has made it pretty clear. If you understand what he said, then you can go to the next question, because I understand what he said.

MR. FABRE: Maybe the witness could answer my question, your Honor, of whether they were concerned in the PUC office with actual competition. He should be able to answer that question. Can you answer that question, Mr. Singleton?

THE COURT: Go ahead.

THE WITNESS: To determine what would be one

truck versus another truck on the highway is this what you are trying to get at?

Q (By Mr. Fabre) On actual competition.

A If this is true, then we are in no position to make a physical survey of a truck servicing — common carrier truck servicing or not servicing. Maybe you could serve it today, actual competition, I'm speaking of now, and tomorrow the common carrier would not be servicing. So, he would be without the actual competitive factor. This could change on a daily basis, to get into the actuality of the competition.

Q It would make no difference with your determination whether there was a common carrier that was in the actual business of hauling pea vines with the peas in the pods to the vinery in the field during these years that we are involved with here?

A We made no such determination that there was.

Q Well, Mr. Singleton, can't we say your office wasn't interested in actual competition?

A Definitely not.

Q That's the point I was trying to get to.

A We are interested.

Q As a matter of fact, none of these so-called common carriers that you mentioned were actually engaged in the hauling of pea vines in the years 1962 through 1965, according to your knowledge?

A I am unable to say they were. I am also unable



to say they weren't. In other words, their reporting to us, sir, is such that I would not be knowledgeable in this. This would call for a physical inspection, either by our field staff or someone reporting to us. But, their statistical records to us do not embrace this, or do not show this to be a fact.

It is therefore submitted that the Public Utilities Commissioner correctly determined that there was competition within the contemplation of ORS 767.420(4) and correctly performed his administrative duty by prescribing the rate for the contract hauling at the approved rate, comparable to that which a common carrier would be obligated to charge upon a request for the appellee.

Appellant cites many cases defining "common carrier", many of which were decided just after the turn of the century before there was complete regulation of the motor transit industry by governmental agencies.

Even prior to statutory regulation of carriers, courts adopted definitions of a common carrier and spoke as did the U. S. Supreme Court in *U. S. v. Louisiana & P. R. Co.*, 234 U. S. 46, 34 Sup. Ct. 741 (1914), at page 746:

It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character. This principal has been frequently recognized in the decisions of the courts. We need not cite the many state cases in which it has been so held.

In *Waldum v. Lake Superior Terminal & Transfer Co.*, 169 Wis. 137, 170 N. W. 729 (1919), the court reaffirmed its definition as follows:

A common carrier is defined as one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place.

Appellee contends that a common carrier has a duty and a right to carry public goods co-extensive with the terms of his permit authority. This subject is treated in 60 CJS § 84, p. 270, as follows:

The services in which a certificate holder may engage, or which he is under obligation to perform, depend upon the services authorized or required by the certificate.

Cases enunciating the same rule are *Graham v. Dean*, 186 SW 2d 692 (1945), and *Colombo v. Pennsylvania Public Utility Commission*, 159 Pa. Super. 483, 48 A. 2d 59 (1946).

*Graham v. Dean*, *supra*, recites:

A public service corporation may not operate only when the weather is pleasant or when there is a chance for profit. The obligation to serve the public is inherent in every certificate of public convenience.

ORS 767.005(5)<sup>8</sup> provides a statutory definition of a common carrier.

ORS 767.005(5)<sup>9</sup> provides a statutory presumption as to when a carrier is a common carrier.

<sup>8</sup>. See appendix p. 62

<sup>9</sup>. See appendix p. 64



Appellant seems to contend that a carrier can submit an application to the Public Utilities Commission as required by ORS 767.125, set forth his financial ability to haul, equipment to be used in the hauling, the property he proposes to haul and the territory in which his operation is to be conducted, secure his permit (most times referred to as a certificate of convenience and necessity), and then actually haul only what he chooses from the products listed in his permit.

Appellee contends that when a carrier applies for his permit, he represents, and must prove, to the Public Utilities Commission that he will haul, upon request, any of the items specified in his permit, and he further represents, and must prove, that he has the equipment to fulfill his obligation. He thus, by the application and proof to the commission, "holds himself out to the public" as ready, willing and able to haul all commodities covered in his application for permit. He does not say, "I apply for authority to haul X, Y and Z, but I am only going to haul X." In legal effect he becomes a competitor at the time his permit authority is granted.

As previously mentioned, the hauling industry is a controlled industry. Only such permittees are licensed as are necessary to meet the needs of the public. It would be absurd to license ten truckers to haul commodity X and then permit all ten to say they did not desire to haul com-

modity X because it was unprofitable or because they had inadequate equipment. The end result would necessarily be that the public would suffer, since no one else would be licensed to haul commodity X. In other words, commodity X would not get hauled.

In this connection it is important to note the words of the court in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (DC Or. 1953), a case in which there was an exhaustive review of the duty of common carriers, the court saying at page 490:

The duty was a public office or trust, confirmed by the government as a franchise, accepted by the carrier voluntarily, and enforced for the public benefit.

In 60 CJS § 84b, at page 268, it is stated:

The obligation to serve the public is inherent in every certificate of public convenience and necessity. The certificate holder must operate at the times and in the manner prescribed by the certificate, thus furnishing uniform and efficient service to the public; he may not operate only when the weather is pleasant or when there is a chance for profit.

It is important to note that the evidence failed to disclose any attempt or request by appellant for hauling service by a common carrier.

### **The Commissioner's Determination of Competition is Not Subject to Collateral Attack.**

It is appellee's position that if the commissioner's in-

terpretation of competition under ORS 767.420(4) could be said to be incorrect, the appellant could not challenge his administrative determination because appellant was a party to the approved contract specifying the approved rate, and, if aggrieved in any way, he should and could have filed a suit against the commissioner, under the provisions of ORS 756.580<sup>10</sup> challenging his authority. This section provides that any party to any proceedings before the commissioner can file suit challenging any act of the commissioner. Such suit can only be filed within 90 days. Failing to do so, the appellant could not collaterally attack the commissioner's finding of competition, the remedy set forth being exclusive.

On the question of defendant's making a collateral attack on the commissioner's determination that there was competition with previously-authorized hauling by common carriers or railroads, consideration should be given to the leading case on the subject, *Steele v. General Mills*, 67 S. Ct. 439, 329 US 34 (1947), which is strikingly similar to the case at issue. In this case the contract carrier, Steele, brought action to recover established hauling rates set by the Texas Railroad Commission. The defendant shipper pleaded a secret agreement fixing rates less than the rates fixed by the commission. The shipper contended, as in the case at issue, that the commissioner was without jurisdiction to fix the rates because Texas law limited

10. See appendix p. 62

his power to fixing contract carrier rates only when there was competition with common carriers. The District Court held for the carrier; the Circuit Court held for the shipper (*General Mills v. Steele*, 5 Cir., 154 F. 2d 367), stating as follows

The majority conclude that petitioner should not recover because the agreement to pay less than the full rate was a subterfuge, that neither party had any intention of living up to the agreement and that their conduct amounted to a fraud upon the railroad commission, contrary to good morals and that [it] tended to interfere with the purity of the administration of the law, such as puts both parties in *pari delicto* with no right to seek advantage of recovery \* \* \* on the 'spurious' contract. The dissenting judge did not agree that the records showed a deliberate purpose to evade the statutes. He further thought that under controlling Texas law and policy the doctrine of *pari delicto* could not be applied so as to have the goods of a Texas shipper hauled in Texas at a less rate than the others were compelled to pay by law. All the judges agreed, however, that the agreement to pay less than the Commissioner-fixed rates was void.

The United States Supreme Court, however, held:

Nor can we say that the District Court and the Circuit Court of Appeals erred in interpreting Texas law to render the supplemental agreement between the petitioner and respondent designed to circumvent payment of Commission-fixed rates void and unenforceable. The District Court's holdings that the Commission's rate fixing orders applied to petitioner's business, that they were not subject under Texas law to the collateral attack here made, and that petitioner could not carry respondent's goods at less than the rates fixed were well buttressed by state statutes and

court decisions. No argument here made by respondent or state decisions on which it relies refute the District Court's reasoning or conclusion.

See also *W. S. Dickey Manufacturing Company v. Corder*, 310 F. 2d 764 (1964), citing *Steele v. General Mills*, *supra*. *Oil Field Haulers Assn., Inc. v. Railroad Commission*, 381 SW 2d 183.

The case of *Butcher v. Flagg*, 185 Or. 471, 203 P. 2d 651 (1949), was a direct statutory proceeding against the Oregon Public Utility Commissioner, and, even there, where the attack on the commissioner's determination was not collateral, as it is here, the court says:

(2) By Sec. 133-502 authority is conferred upon the commissioner to determine whether permission shall be granted to construct a highway across the track of a railroad company at grade. Determination of this matter is a legislative or an administrative question. *Warren v. Bean*, 167 Or. 116, 125, 115 P. 2d 167; *Pacific Tel. and Tel. Company v. Wallace*, 158 Or. 210, 220, 75 P. 2d 942; *Pierce Auto Freight Lines, Inc. v. Flagg*, 177 Or. 1, 38, 159 P. 2d 162. In *Warren v. Bean*, *supra*, this court quoted with approval the following excerpts from *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51, 556 S. Ct. 720, 725, 80 L. Ed. 1033:

" . . . The court does not sit as a board of revision to substitute its judgment for that of the Legislature or its agents as to matters within the province of either. [Citing authorities.] When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to



make findings of fact which are conclusive provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. [Citing authorities.] In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

Thus, it will be seen that the only limiting qualification of the commissioner's determination is the "due process" compliance. Here, there is no due process problem because the hauling contracts were executed for the avowed purpose of submission of the same to the commissioner. The agreement of the parties being thus evidenced to the commissioner, no hearing or formal order is required, and neither of the contracting parties can now complain of the lack thereof.

The case of *Warren v. Bean*, 167 Or. 116, 115 P. 2d 167, a carrier case in which another direct proceeding against the commissioner came before the Oregon Supreme Court for review, was decided upon the question of the court's authority to review an administrative determination of the commissioner. There, the court said:

The determination of whether a permit shall be granted or refused is a legislative or administrative question and not a judicial question. Courts do not have *jurisdiction* to determine legislative or administrative questions and they can no more exercise that

function than the commissioner can exercise judicial functions. (Emphasis supplied.)

In the case of *Callanan Road Improvement Co. v. U. S.*, 345 U. S. 507, 73 S. Ct. 803 (1953), the following facts were considered.

Prior to 1943 Hutton operated a freight boat and barges, and in a "grandfather" proceeding was granted authority for self-propelled vessels, but not for barges. He operated under this authority until 1944, as he had before, using both the boat and barges. The commission on its own motion reconsidered his original application and limited the authority to his use of the boat only. He died several months later and Callanan Road Improvement Co. acquired his authority. In 1951 Callanan filed a petition for interpretation of the authority in an amended certificate (1944), claiming right to towing service and that the limitation imposed on Hutton in 1944 was unauthorized. The commissioner held against Callanan, and Callanan appealed to a three-man U. S. District Court, which refused to set aside the commissioner's order. This appeal to the U. S. Supreme Court followed:

... The appellant cannot now raise the question of the power of the Commission to modify the original certificate of July 17, 1942, by the limitations contained in the order of March 7, 1944. Whether the Commission's action in reopening the 1942 proceedings and placing the limitations on the certificate theretofore issued was right or wrong, the jurisdic-



tion of the Commission was not destroyed thereby. A direct attack in such circumstances was the remedy.

(2.3) Hutton not only did not object. He accepted the modified certificate and operated under it, just as he had always operated. His operation was not cut down by the limitations placed upon the certificate. The appellant, as transferee of that modified certificate, stands in no better position than Hutton stood. Cf. *Gregg Cartage & Storage Co. v. United States*, 316 U. S. 74, 82-83, 62 S. Ct. 932, 936, 86 L. Ed. 1283. Indeed, in the 1947 transfer proceedings before the Commission when the appellant sought to acquire Hutton's amended certificate of March 7, 1944, the appellant objected that the protestant there could not raise the question of the Commission's power to modify the certificate, as this would be a collateral attack on the Commission's order. That is exactly what the appellant seeks to do here. It cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. *Securities & Exchange Comm v. Central - Illinois Sec. Corp.*, 338 U. S. 96, 143, 69 S. Ct. 1377, 1401, 93 L. Ed.; *Stanley v. Supervisors*, 121 U. S. 535, 550, 7 S. Ct. 1234, 1239, 30 L. Ed. 1000; *Reconstruction Finance Corp. v. Lightsey*, 4 Cir., 185 F. 2d 167; *City of Tulsa v. Midland Valley R. Co.*, 10 Cir., 168 F. 2d 252, 254; *Brown County v. Atlantic Pipe Line*, 5 Cir., 91 F. 2d 394, 398. The appellant must take the certificate as it stood at the time it sought and received the Commission's approval for its transfer.

(4) Furthermore, the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, is now estopped to deny the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer. *United Fuel Gas Co. v. Railroad Comm.*, 278 U. S. 390, 307-308, 49 S. Ct. 150, 151, 152, 73 L. Ed. 390; *St. Louis Malle-*

*able Casting Co. v. George C. Prendergast Construction Co.*, 260 U. S. 469, 43 S. Ct. 178, 67 L. Ed. 351, This is especially true in view of the appellant's contention at the 1947 transfer hearing that the protestant in that hearing could not raise the question there which the appellant seeks to raise here, as it would constitute a collateral attack on the order of the Commission. The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval.

The *Callanan* case, cited herein, is the leading case on the question of a collateral attack being made against an administrative decision. It is submitted that it is a controlling decision in this case.

In *Snipes v. U. S.*, 230 F. 2d 165 (1956), there was a petition by the Commissioner of Internal Revenue to seek review of a decision of the tax court that the War Production Board had no authority to issue partial certificates of necessity, and that the taxpayer was entitled to amortization of the entire costs of such facilities governed by such certificates. The evidence disclosed that the taxpayer had accepted the administrative decision of the War Production Board and had accepted the benefits and had amortized the emergency facilities constructed during World War II. The court held that where the taxpayer has accepted benefits from the administrative decision, he forfeited his right to challenge the War Pro-

duction Board's authority. The court then cites from *Callanan*, *supra*, the quotation being from page 806:

(4) Furthermore, the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, it is now estopped to deny the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer.

The court further observed that the appropriate method was a direct attack by mandamus, rather than to attempt to attack the authority of the War Production Board collaterally.

In the case of *Admiral Towing v. Woolen*, 290 F. 2d 644 (1961), wherein the court gave consideration to a federal statute that the owner of a ship could petition to limit his liability arising out of loss of the ship, the court observed that the owner had originally sought to come under the statute. In the instant proceedings, he took a contrary position and again the court held that the owner was estopped from following such a course, again quoting from the *Callanan* case:

. . . The appellant cannot blow hot and cold and now take a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer.

The *Callanan* case was again considered in the case

of *Kroblinen Refrigerated Xpress v. U. S.*, 197 F. Supp. 44 (1961). The case involved a question of whether the word "groceries" included "fresh meats". The I. C. C. said that it did not. Action was then instituted by the carrier to set aside the order of the I. C. C. The court said at page 44, citing the *Callanan* case:

. . . Such a contention is no answer to the present charge of permit violation, since the permit cannot be collaterally attacked.

**The Public Utilities Commissioner Having Established the Hauling Rate, There Can Be No Defense to Non-payment Thereof.**

There are many federal cases which announce and explain the rule. The leading federal case is *Louisville & Nashville Railroad Company v. Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (1915) wherein the court stated:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination . . .

. . . As was said in *Kansas City Southern Railway*

*Company v. Carl*, 227 U. S. 639, 653; 57 L. Ed. 683, 688; 33 Sup. Ct. Rep. 391,

“Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper’s knowledge of the lawful rate is conclusively presumed . . .”

It is important to note the similarity between the federal statute and the Oregon statute on the absolute prohibition against variation from established rates. 49 USCA 317 reads as follows:

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff and the rates, fares and charges specified in the tariffs in effect at the time; and no carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares or charges so specified, or extend to any person any privilege or facilities for transportation in interstate or foreign commerce, except such as are specified in its tariffs . . .

ORS 767.410 (2) recites:

(2) No common carrier or forwarder shall:

(a) Charge, demand, collect or receive a greater, less or different remuneration for the transportation of passengers or property, or both, or for any service in connection therewith, than the rates, fares and



charges which have been legally established and filed with the commissioner.

(b) Refund or remit in any manner or by any device any portion of the rates, fares and charges required to be collected by its tariffs on file with the commissioner.

Under federal law shippers and consignees dealing with common carriers subject to the Interstate Commerce Act have an absolute obligation to pay the duly-filed and published tariff rates. This was established by the United States Supreme Court in *Gulf, Colorado and Santa Fe Railway Company v. Hefley*, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910 (1895), and *Texas and Pacific Railway Company v. Mugg*, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011 (1905). The rule has been rigorously followed ever since. *Illinois Central Railroad Company v. Henderson Elevator Company*, 226 U. S. 441, 335 S. Ct. 176, 57 L. Ed. 290 (1913); *Louisville & Nashville Railroad Company v. Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853 (1915); *Western Transit Company v. A. C. Leslie & Company, Ltd.*, 242 U. S. 448, 37 S. Ct. 133, 61 L. Ed. 423 (1917); *Pittsburgh, C. C. & St. L. R. Co. v. Fink*, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151 (1919); *New York Central R. Co. v. York & Whitney Co.*, 256 U. S. 406, 41 S. Ct. 509, 65 L. Ed. 1016 (1920); *Louisville & Nashville Railroad Company v. Central Iron & Coal Company*, 265 U.S. 59, 44 S. Ct. 441, 68 L. Ed. 900 (1924);

*Turner, Dennis & Lowry Lumber Company v. Chicago, Milwaukee & St. Paul Railway Co.*, 271 U. S. 259, 46 S. Ct. 530, 70 L. Ed. 934 (1926); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 59 S. Ct. 612, 83 L. Ed. 953 (1939).

It was said in *Chicago & Alton Railroad Company v. Kirby*, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033 (1912), that a shipper is presumed to know the published rates. Similar language appears in many subsequent decisions. *Kansas City Southern Railway Company v. Carl*, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683 (1913); *Boston and Maine Railroad v. Hooker*, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868 (1914).

In addition to repeated holdings of the United States Supreme Court, the rule that a shipper cannot avoid paying the tariff rate has been recognized by many other federal authorities as well as by the courts of more than 25 states. The decisions are collected in an annotation, "Carrier's right or liability in respect of excess of lawful charge over charge understated where discrimination is forbidden," 83 ALR 245, supplemented in 88 ALR 2d 1375 at page 1378.

Misquotation of rates by the carrier's agent is no defense to an action for undercharges. *Texas and Pacific Railway Company v. Mugg*, *supra*; *Kansas City Southern Railway Company v. Carl*, *supra*; *Louisville & Nashville*



*Railroad Co. v. Maxwell, supra; Pittsburgh, C. C. & St. L. R. Co. v. Fink, supra; Louisville & Nashville Railroad Company v. Central Iron & Coal Company, supra.*

It must be emphasized a carrier's contract to ship for less than the tariff rate is not a defense. *Gulf, Colorado and Santa Fe Railway Company v. Hefley, supra; New York Central & Hudson River R. Co. v. York & Whitney Co., supra; Louisville & Nashville R. Co. v. Central Iron & Coal Company, supra; Chicago & Alton Railroad Company v. Kirby, supra.*

Even the carrier's fraud is no defense. In *Kansas City Southern Railway Company v. Carl, supra*, it was said: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper." This language was quoted with approval in *Louisville & Nashville R. Co. v. Maxwell, supra. Herminghausen v. Adams Express Co.*, 167 Iowa 230, 149 NW 234 (1914) indicated that allegations of fraud and deceit by a shipper in his action against an interstate carrier for loss suffered by misquotation of rates would be demurrable. In *F. Burkhart Mfg. Co. v. Fort Worth & D. C. Ry. Co.*, 149 F. 2d 909 (8th Circ. 1945), a carrier was allowed to recover undercharges from the innocent endorsee of bills of lading, even though such undercharges were made as part of a conspiracy between the carrier and the consignor-consignee.

A carrier's action for undercharges cannot be resisted on grounds of estoppel. *Pittsburgh, C. C. & St. L. R. Co. v. Fink*, *supra*; *Louisville & Nashville R. Co. v. Central Iron & Coal Co.*, *spura*; *Union Pacific Railroad Company v. Corneli Seed Company*, 161 F. Supp. 52 (DC SD Idaho, 1958); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F. 2d 441 (CA Colo., 1951); *Christensen v. Northern Pac. Ry. Co.*, 184 F. 2d 534 (CA N. D. 1950); *Petroleum Co. v. Sinclair Pipeline Co.*, 282 F. 2d 913 (CA Colo. 1960); *United States v. Garner*, 134 F. Supp. 16 (DC N. Y. 1955); *Hughes Transp. v. United States*, 121 F. Supp. 212 (Ct. Cl. 1954); *Union Transfer Co. v. Renstrom*, 151 Neb. 326, 37 NW 2d 383 (1949). See also 83 ALR 245, 257.

In the case of *McFadden v. Alabama Great Southern Railroad Company*, 241 F. 562 (1917), the court considered and disposed of the questions of fraud, intent, mistake, contract rights, notice to shippers of rates and public policy as follows:

In approaching this question [which tariff to apply] we lay aside all considerations of conduct, intention, mistake and misunderstanding respecting the rate paid, for the law is very well settled that the Act to Regulate Commerce demands not only that the carrier shall charge but that the shipper shall pay the legal rate. The contract between carrier and shipper is no longer a contract as to rate; it is merely a contract that the carrier will render transportation service when the shipper pays the legal rate. When

the transportation is interstate, the interstate rate is the legal rate, and that rate must be demanded and paid, for both the carrier and shipper are charged with notice of it; and if a lesser rate is charged and paid, intentionally or innocently, recovery must be had against the shipper for the difference, in order that the policy of the law against unjust discrimination may be carried out. *L. & N. R. R. Co. v. Maxwell*, 237 U.S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L R A 1915 E, 665; . . .

Also, the District Court in *Atchison, Topeka & Santa Fe Railroad Company v. Judson Freight Forwarding Company*, 79 F. Supp. 789 (1943), was confronted with an unusual problem. The carrier had a provision in its tariff that if a shipper ordered a 50-foot car, it could substitute at its own convenience two 40-foot cars. There were 105 separate shipments involved. The court first found that if the carrier in good faith made the substitution, that action could not later be re-examined. It then found as a fact that the shipper would order a 50-foot car, but in doing so understood that the carrier would in fact supply two 40-foot cars. Faced with this situation, the court held:

All practices, schemes or devices whatsoever that run counter to those sections [49 USCA § 2, 3(1), 6(7) and 20(7)] are prohibited. All shippers are supposed to be on equal terms. Concessions, preferences, advantages and rebates counter to the fixed rates duly posted and published are now prohibited and are measured by results. The courts are charged with the duty of cutting through subterfuge and pretense, getting at the very roots of every form of discrimination . . .

Under shippers' contention an illegal contract in the form of a bill of lading would be absolutely binding, and the court would be helpless in attempting to ascertain the truth. Such argument falls under its own weight. Evidence is admissible to show that an agreement legal on its face was in fact an illegal transaction . . .

Inasmuch as the contract between the parties was in violation of law and contrary to public policy, it was a nullity and not binding on either party. Freight charges are fixed by the tariff rate and in effect fixed by law, and any bill of lading that attempts to fix a rate contrary to the legal rate is ineffectual.

The court then quotes from the 1917 *McFadden* case the same language we have quoted from that case and goes on to point out that the "cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness and certainty of charges for services." Further, the court pointed out that the tariff is the rate imposed by law; private contract cannot subvert tariff rates and is void if different than tariff rates, that not only are private litigants involved, but public policy; and that the carrier has a *duty* to sue for the undercharges.

*National Carloading Corp. v. Atchison, T. & S. F. Ry. Co.*, 150 F. 2d 210 (1945), is the appeal of the *Judson* case. In affirming the District Court it is held that "Conduct, intention, mistake and misunderstanding are no de-

fense," citing the *McFadden* case above as authority. Significantly, the court held:

. . . It is well established that the acts of the parties herein affect not only themselves, but also the welfare of the public.

*Atchison, T. & S. F. Ry. Co. v. White*, 49 F. Supp. 797 (1943) was decided the same day and by the same court as the *Judson* case above-cited, with substantially the same facts in issue. The court reaches the same conclusion, naturally enough, and, like the *Judson* case, was affirmed on appeal. *White v. Atchison, T. & S. F. Ry. Co.*, 149 F. 2d 919 (1945). The District Court did, however, take the opportunity to expand on the *Judson* opinion, pointing out that:

The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . And they are not affected by the tort of a third party.

In the recent case of *Union Pacific Railroad Company v. United States*, 313 U. S. 450-462, 61 S. Ct., 1064, 1971, 85 L. Ed. 1453, the Court through Mr. Justice Reed, said "Violation of the commerce acts through receipt of advantages is to be tested by actual results not by intention . . . In fact, favoritism which destroys equality between shippers, however, brought about, is not tolerated."

The opinion also cited the Brandeis opinion in *Louisville & N. R. Co. v. Central Iron & Coal Co.*, *supra* on the principle that rates which are fixed by law cannot be varied



by contract and that the acts and omissions of a carrier could not give rise to estoppel.

Finally, it declared:

Tariff provisions have the force and effect of a statute and cannot be deviated from under any circumstances. *Penn. Railroad Company v. International Coal Mining Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446; *Louisville & Nashville Railroad Company v. Maxwell*, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853, LRA 1915E, 665; *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 59 S. Ct. 943, 83 L. Ed. 1409; 13 CJS, Carriers, § 393, pp. 837-876; *Button v. Atchison, Topeka & Santa Fe Railway Co.*, 8 Cir., 1 F. 2d 709.

One of the more unusual undercharge cases is *Fort Worth & D. C. Ry. Co. v. F. Burkhart Mfg. Co.*, 56 F. Supp. 159 (1944). The unusual aspects were that the carrier was suing the consignee for the undercharge, a number of the carrier's employees already having been convicted on misdemeanor counts in connection with the shipments, and the shipper having been convicted of a felony in connection therewith, all convictions being for conspiracy to violate the law by "causing the shipment in question to be transported at a rate less than that required by law." On the other hand, the defendant in the case was innocent of wrongdoing and had no knowledge of the conspiracy.

Fraud and estoppel were pleaded in defense to the complaint. The court held, quoting from another case:

The railroad, suing in its interest, alone, might be estopped; but in suing under the statute, it is suing as a trustee for the protection of the public. The public, in whose interest, as well as its own, the carrier has a lien on the undelivered freight for the full rate, is not estopped, because it did not so act and made no representation on which the consignee relied, and, when the consignee accepted the goods, it deprived the public of that lien. It follows that the consignee, because of such act, still remains liable to the carrier, who sues in the public's interest for the value of the right destroyed.

There is sound reason for this public policy which is at times perhaps rather severe. The court, quoting from yet another case, gave one of those reasons as follows:

. . . Collusion between the carrier and a shipper, which it desired to favor, for protection of other than the tariff rates, would be rendered too easy of accomplishment. In such case the carrier could protect any rate which it might desire to apply by simply quoting it to the favored shipper, and thus the integrity of the published tariffs (a strict observance of what is required by law in order to prevent unjust discrimination) would be constantly violated.

The most recent case of which we are aware is *Minton v. General Shale Products Corp.*, decided in the Tennessee Court of Appeals, Eastern Section, December 4, 1962, 15 Federal Carriers Cases, paragraph 81, 507, holding that the defense of estoppel is not available to a shipper to defeat its liability for payment of charges due for the transporting of its products under a contract and



schedule of minimum rates or charges filed with, and approved by, the Interstate Commerce Commission.

There are four Oregon decisions which recognize and apply the federal rule in cases involving interstate shipments, and it is submitted that they certainly set forth and adopt the reasoning of the many federal cases cited herein. *Baldwin Land Co. v. Columbia Ry. Co.*, 58 Or. 285, 114 P. 469 (1911); *Zoller Hop Co. v. Southern Pacific Co.*, 72 Or. 262, 143 P. 931 (1914); *Black v. Southern Pacific Co.*, 88 Or. 533, 171 P. 878 (1918); and *Oregon-Washington R. & N. Co. v. Cascade Contract Co.*, 101 Or. 582, 197 P. 1085 (1921). In the *Baldwin* case the court stated:

If the rate quoted is less than the schedule rate approved by the Interstate Commerce Commission and published, the shipper is liable for the full rate, whether he actually knows that the rate quoted is less than the schedule rate or not.

In *Zoller Hop Co. v. Southern Pacific Co.*, *supra*, the court said:

Where the law had provided authentic and conclusive means of knowledge, a shipper cannot close his eyes and ears to official information, and be heard to say he did not know, and hence was defrauded.

*Black v. Southern Pacific Co.*, *supra*, the court found:

Neither the shipper nor the carrier is bound by the rate actually paid because the shipments are neces-

sarily controlled and governed by whichever published rate is applicable to the shipment.

In *Oregon-Washington R. & N. Co. v. Cascade Contract Co.*, *supra*, the court said:

The defendant was bound to know the existing tariff. It was charged with knowledge that the plaintiff could not charge less or more than, or any rate different from that prescribed in the current schedule.

In addition to the cited Oregon cases, consideration should be given to the historical development of the Oregon statute law in this area, which demonstrates that not only has the Supreme Court of the state of Oregon followed the interpretation of the federal courts, but that the historical development of the Oregon statute law is patterned after the federal statutes.

ORS 767.410, which regulates intrastate motor carrier rates, is closely modeled after comparable provisions of the Interstate Commerce Act. Subsections (1)(a) and (2)(a) and (b), are similar to 49 USCA 6 (1) and 6 (7) (Part I of the Interstate Commerce Act, regulating rail carriers); to 49 USCA 317(a) and (b), set forth above, (Part II of the Interstate Commerce Act, regulating motor carriers); to 49 USCA 906 (a) and (c) (Part III of the Interstate Commerce Act, regulating water carriers); and to 49 USCA 1005 (a) and (c) (Part IV of the Interstate Commerce Act regulating freight forwarders). Part I of

the Interstate Commerce Act was enacted in 1877. Feb. 4, 1877, c. 104, 24 Stat. 379. Part II was added in 1935, Aug. 9, 1935, c. 498, 49 Stat. 543; Part III in 1940, Sept. 18, 1940 c. 722, Title II § 201, 54 Stat. 929; and Part IV in 1942, May 16, 1942, c. 318, § 1, 56 Stat. 284.

The Oregon code regulating motor carriage, now ORS Chapter 767, has many times been revised. Provisions similar to those of ORS 767.410(1)(a) and (2)(a) and (b) were first enacted in 1925. Or. L. 1925, ch. 380 secs. 23 and 26; OC 55-1323, 55-1326. Subsequent revisions and re-enactments of ORS 767.410 are as follow: Or. L. 1933, ch. 429 § 6 p. 753; Or. L. 1933 (2d S. S.), ch. 45 § 5 p. 134; Or. L. 1935, ch. 415 § 4, p. 692; O C (1935 Suppl.) 55-1346; Or. L. 1939, ch. 523, § 3 p. 1101; Or. L. 1947, c. 467 § 6; OCLA (s) 115-5a06; Or. L. 1949, c. 448 § 3; Or. L. 1961, c. 548 § 1.

Possibly, the 1925 act was modeled upon the Oregon Railroad Commission Act, Or. L. 1907, c. 53 (LOL 6875 et seq.) rather than directly upon the Interstate Commerce Act, although the Railroad Commisison Act was itself based in large part upon the federal act.

The fact of controlling significance is, however, that when Oregon enacted its motor carrier code in 1925, federal laws very similar in wording to ORS 767.410 (1) and (2) (a) and (b) had already received the well-settled interpretation which has been discussed in this brief. As pre-

viously stated, in addition to many decisions of United States courts and courts of other states, the Oregon Supreme Court had spoken four times upon the subject. If the Oregon legislature intended that some rule other than the federal rule should apply in this state, it is inconceivable that it would have followed the wording of federal acts so closely both in the 1925 act and subsequent revisions without adding some qualifying provisions.

It is important to note that affirmance of the judgment for the appellee would not subject the appellant to any unfairness or discrimination because, by any interpretation, it would only be paying now what the law required it to pay when the services were rendered, and, more particularly, it is only paying now what it would have had to pay a common carrier who performed the same service that appellee performed.

**The Parol Evidence Rule Bans Oral Evidence Denying the Validity of a Written Contract Executed with the Intent of Misleading a Third Party.**

ORS 41.740:

Parol Evidence Rule. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the con-

tents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties.

Appellant contends that the trial court erred in ruling inadmissible under ORS 41.740 the testimony of Mr. Stoddard that the written contracts that were filed with the Public Utility Commissioner were not the true contracts of the parties and that the true contract was an oral agreement that it is claimed has been fully paid and performed.

However, the rule adopted by Judge Solomon is clearly in accord with the current and controlling law of Oregon, albeit the minority view on the subject. This rule is succinctly stated in *Kergil v. Central Oregon Fir Supply Co.*, 213 Or. 168, 189, 323 P. 2d 947, 948 (1958), a case that is squarely on all fours with the instant case, and one in which the Oregon Supreme Court reviewed both the majority and minority views before announcing through its Chief Justice which view should prevail in Oregon.

The defendant having admitted the execution of the written lease agreements, and seeking to avoid their effect solely on the basis of the fact that they are pretended and sham, thus admits that, if the leases



are valid and do set forth the consideration for the use of the equipment of the plaintiff, any attempt to offer oral evidence of a different consideration for their use would violate the parole evidence rule set forth in ORS 41.740. *Biersdorf v. Putnam*, 181 Or. 522, 182 P. 2d 992; *Coker & Bellamy v. Richey*, 104 Or. 14, 202 P. 551, 204 P. 945, 204 P. 947, 22 ALR 744; *Muir v. Morris*, 80 Or. 378, 154 P. 117, 157 P. 785.

Therefore, the sole basis of the defendant's defense, simply stated, is the plaintiff and defendant did not intend to create a valid lease agreement in writing for the use of plaintiff's equipment, but entered into these leases for the purpose of avoiding the payment of certain taxes which would be due and owing if the defendant engaged the plaintiff to transport its lumber as a contract carrier.

. . .

Thus, the principal question is: Will the law permit consideration of oral evidence denying the validity of the written memorial of the parties when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third party?

The courts are not of a single mind upon this issue. We confess, the majority of jurisdictions at the present time, based upon pure logic, admit the evidence on the basis that such testimony is offered, not to vary the terms of the written instrument within the letter of the parole evidence rule, but only to show the parties never intended the written instrument to be a binding agreement.

The difficulty with this view is that it overlooks the moral aspects of the situation. It permits the law to be used to lend its aid to those who would mislead

or defraud third parties without providing any restraining penalty upon their immoral actions. Of the majority view, the eminent Michigan law professor John E. Tracy, 33 Michigan Law Review 411 (1934-35), speaks thus:

“A rule admitting such testimony encourages dishonest men in pursuing fraudulent practices. If such a man knows that he can, to his profit, with little risk to himself, deceive his neighbor by arranging to have exhibited to such neighbor a contract apparently binding but legally unenforceable, can it not be expected that he will do so? Also, would it not be equally apparent to the layman that a dishonest man, faced with certain liability on a contract which he has signed, under such a rule could always create for himself a chance of avoiding such liability by inventing testimony to show that he signed the contract only for the purpose of deceiving someone not a party to the cause? For, under the rule as laid down by the authorities, against such testimony, if believed by the jury, the court is powerless to do justice, however preposterous the court may feel it to be.”

And Professor Wigmore, 9 Wigmore on Evidence 16, §2406, states the following:

“When the document is to serve the purpose of a mere *sham*, this principle in strictness exonerates the makers. But a just policy would seem to concede this only when the pretence is a morally justifiable one (As, to calm a lunatic or to console a dying person). When it is *morally beyond sanction*, or aims at an *evasion of the law* or a deception of other persons, by intent of the parties, that intention will not be given effect. Hence, if the *validity* of the instrument would



give effect to such intention (as in usury), the instrument will not be enforced; *but if the invalidity of the instrument would give effect to such intention, the instrument will be enforced.* (Emphasis supplied.)

At an early date the Supreme Court of Pennsylvania considered this issue in the case of *Evans v. Dravo*, 24 Pa. 62, 62 Am. Dec. 359. In that case the plaintiff owned property sought by one Gilpin as a site for a mill. While the property was of a value of \$2,500, plaintiff sold to Gilpin for \$500, with bond attached signed by other parties to pay plaintiff \$2,000. When these parties were sued they testified they were not to be held liable on the bond since the only reason for its existence was that plaintiff had to have it to persuade his wife to join him in the deed. The Supreme Court held the evidence should never have been admitted, saying on page 67:

“ . . . If a plaintiff, who has been party to a fraud, has, in order to show consideration, or for other purposes of his action, to go beyond the instrument sued on, and unravel the transaction on which it was founded, he cannot have the assistance of Courts, either of equity or law, where the defendant has given the plaintiff perfect cause of action, by an instrument unimpeachable in itself, Courts are bound to sustain it, because they are not at liberty to presume it fraudulent, and the law forbids a confederate to prove it fraudulent. The rule is calculated to make men honest in their dealings, not only as between themselves, but in respect to the absent, the dependent, and the ignorant, and we think this a fitting case to which to apply it.”

Later, in *Hendrickson v. Evans*, 25 Pa. 441, the court was asked to overrule this decision upon the

same facts and in sustaining its prior ruling on page 444 said:

“The plaintiff was then and is now in possession of a legal and valid cause of action . . . But the defendant alleges an equity which ought to restrain him, and, to make it out, is obliged to show the fraudulent transaction. In respect to that matter, the real substance of the dispute, he is the actor. He alleges and proves the fraud. This the maxim forbids him to do . . . As to the equity relied on by him he is plaintiff in fact, whatever the forum or the position of the parties on the record.”

Other courts have adopted this rule which we believe is the one most in conformity with the dictates of justice. See *Graham v. Savage*, 110 Minn. 510, 126 NW 394; *Higby v. Hooper*, 124 Mont. 331, 221 P. 2d 1043; *Supreme Lodge Knights of Pythias v. Dalzell*, 205 Mo. App. 207, 223 SW 786; *Gagnon v. Fleury*, 117 Vt. 382, 92 A. 2d 470; *Town of Grand Isle v. Kinney*, 70 Vt. 381, 41 A. 130. See dissent in *Hoss v. Purinton*, 9 Cir., 229 F. 2d 104.

Under the facts in this case, the trial court erred in admitting testimony of another and different oral contract from that expressed by the parties in their executed written leases.

The *Kergil* case clearly states the controlling rule and is not distinguishable from the instant case. These two cases are strikingly similar as to both facts and claimed defenses to the written memorials of the parties.

The rule of the *Kergil* case again came before the Supreme Court of Oregon for review five years later in

*Mock v. Bell Motors, Inc.*, 234 Or. 224, 380 P. 2d 992 (1963). There, the court in a three-paragraph per curiam opinion, citing *Kergil*, held that a written contract for the purchase of an automobile sales business could not be set aside on the ground that the written agreement was not the actual contract and that the sale was governed by an oral agreement which was materially different, and that the written contract was executed solely for the purpose of obtaining the acquiescence of the automobile manufacturer for the sale. The *Mock* case decided only this one question and no other, categorically reaffirming the rule of *Kergil*.

Again the parol evidence issue came before the Oregon court, en banc, in the recent case of *Carolina Casualty Insurance Co. v. Oregon Auto Insurance Co.*, 242 Or. 407, 408 P. 2d 198 (1965). There, the parties entered into a written truck lease, to evade I. C. C. regulations, and the carrier continued to control and operate the trucks. A serious accident occurred involving one of the trucks in question and an issue developed as to whether the shipper's co-insurer was liable for a resulting personal injury settlement loss. The shipper's co-insurer claimed nonliability to contribute to the personal injury settlement on the ground that the written lease was a sham and not the true agreement.

The court, reaffirming its adoption of the minority rule as expressed in *Kergil* and *Mock* states:

We have been unable to find any Oregon decisions discussing the law where there is no morally reprehensible purpose to be accomplished by a writing not intended to have legal effect. However, Oregon does not follow the weight of authority where the purpose sought to be accomplished by such a writing is morally objectionable. *We follow the minority rule which says that where a written contract was entered into to accomplish a morally objectionable purpose, parol evidence that the writing was a sham will not be received.* Otherwise, a court is used to aid those who would mislead or defraud third parties. (408 P. 2d 201, emphasis supplied.)

A lengthy review of the facts and rationale of the *Kergil* case is then set forth, followed by a reiteration of the purpose of the Oregon rule.

The purpose of the *Kergil* rule is to act as a deterrent to sham contracts entered into with a morally objectionable *intent to mislead* third parties. (Emphasis supplied.)

The court concluded that the trial court erred in admitting parol evidence that the lease contract was a sham and not intended to create any legal relationship between the parties, and, therefore, reversed.

In *Consolidated Ranches, Inc. v. Chase Land and Cattle Co.*, 408 P. 2d 203 (1965), the Oregon court, again en banc, states at page 205:

Turning to the more troublesome issue of parol

evidence, and the proof of the actual agreement, it must be kept in mind that the parol-evidence rule functions to keep the parties to an integrated writing, and their privies, if they later become adversaries, from denying or changing the terms of their writing.

Other states having adopted the same reasoning as the *Kergil* case and Professor Wigmore are Minnesota, Montana, Pennsylvania and Vermont. They were recently joined by Iowa in 1966 in the case of *Schnabel v. Vaughn*, 140 NW 2d 168. This case concerned the execution of a second lease of certain business premises for the sole purpose of providing evidence that the lessee could use to obtain his automobile dealer's license. The second lease established a shorter term than the first and granted an option to extend. The revised term was required by the licensing agency of the state. The Iowa court ruled as follows, adopting the *Kergil* rule, at page 170:

The evidence offered by plaintiff would tend to prove that the sole purpose of the second sublease was to provide evidence Sutherland could use to obtain his automobile dealer's license. The implication being that the second sublease was never intended to be effective as between the parties. This evidence was rejected by the trial court when it specifically held the parol evidence rule in connection with such evidence was not applicable.

The rule urged by plaintiff is: "A writing may be executed between parties without any intention of affecting legal relations. Such a writing may concern merely transactions of friendship and the like, or it



may be for some ulterior purpose, although it is in reality inoperative and is a sham." 20 Am Jur., Evidence, section 1097, page 957. However, this exception is itself subject to a gloss that where the sham aims at an evasion of the law or a deception of other persons it will not be recognized as an exception to the parol evidence rule. *The entire matter is well put and soundly decided in the Oregon court in the following languages:*

"Thus, the principal question is: Will the law permit consideration of oral evidence denying the validity of the written memorial of the parties when such oral evidence shows the written document was executed for the purpose of defrauding or misleading a third party?"

"The courts are not of a single mind upon this issue. We confess, the majority of jurisdictions at the present time, based upon pure logic, admit the evidence on the basis that such testimony is offered, not to vary the terms of the written instrument within the letter of the parol evidence rule, but only to show the parties never intended the written instrument to be a binding agreement.

"The difficulty with this view is that it overlooks the moral aspects of the situation. It permits the law to be used to lend its aid to those who would mislead or defraud third parties without providing any restraining penalty upon their immoral actions."

. . .

The trial court in its decree properly recognized that plaintiff's evidence indicated the sole purpose of the second sublease was to perpetuate a fraud on

the state. We cannot now ignore this second sublease under the rule cited. (Emphasis supplied.)

*Higby v. Hooper*, 124 Mont. 331, 221 P. 2d 1043 (1950), a Montana case, likewise adopted the *Kergil* rule.

Under certain circumstances, none of which is here present, a person may show that the document in question was intended to serve the purpose of a mere jest, joke or sham. "But a just policy would seem to concede this only when the pretence is a morally justifiable one (as, to calm a lunatic or to console a dying person). When it is *morally beyond sanction*, or aims at an *evasion of the law* or a deception of other persons, by intention of the parties, that intention will not be given effect." 9 Wigmore on Evidence, 3d Ed., sec. 2406, subd. (1), pp. 16, 17.

The law does not allow parties to a contract to show that it was got up as a sham to deceive and defraud. *Graham v. Savage*, 110 Minn. 510, 126 NW 394, 396, 136 Am. St. Rep. 527, 19 Ann. Cas. 1022. So here the defendant will not be permitted to defeat his own solemn written contract by saying that it was given solely for a fraudulent and deceitful use. "He is estopped thus brazenly to assert his own covinous purpose." *Hunter v. Bryan*, 92 Wash. 469, 159 P. 703, 704. See R. C. M. 1947, sec. 13-801. Cf. *Federal Farm Mortgage Corp. v. Hatten*, 210 La. 249, 26 So. 2d 735; *Ewing v. Ford*, 31 Wash. 2d 126, 195 P. 2d 650; *Fereria v. Nunn*, Cal. App. 1950, 220 P. 2d 20; *Young v. Neill*, Or. 1950, 220 P. 2d 89, 94.

The rule of *Kergil*, *Mock* and *Carolina Casualty* cases appears to have previously received the approbation of this court in another case arising in the U. S. District Court for the District of Oregon, wherein Judge Gus J.



Solomon was the trial judge. *West Los Angeles Institute for Cancer Research v. Mayer*, 366 F. 2d 220 (1966). Although the *Kergil* rule was not followed in that case (which was tried to the equity side of the court), it was recognized and cited with approval in footnote 12 at page 227 and distinguished.

Appellee submits that the rule of the *Kergil* case is soundly established beyond dispute as the controlling and current rule of the law of Oregon, where some contractual relationship existed between the disputing parties, which relationship one party contends rests on an oral agreement rather than on their written memorial.

Appellant suggests in his opening brief, at page 32, that the case of *Story v. Hamaker*, 84 Or. Adv. Sh. 145, 432 P. 2d 185 (1967), casts doubt that the Oregon court would follow the *Kergil* case in this appeal. However, the appellant's own brief points up the very apparent distinction which the court noted. It is also to be borne in mind that the *Story* case does not even discuss the *Kergil* rule nor cite any case authority, nor did the briefs on appeal in that case make reference to the *Kergil* rule or any of the cases following it. The *Story* case is one in which the court found no contractual relationship existed between any of the parties unless the same arose out of a real estate contract which the court found was a sham and under which there had been no performance of any

kind. The alleged purchaser had never gone into possession despite the elapse of four years and had made no payments, nor had the Veterans Department acted thereon and made the contemplated loan. The court found no intent on the part of either seller or purchaser to do anything as between themselves pursuant to the alleged contract to sell. Here, in the instant case, Krause contracted with Smith Canning & Freezing Co. to haul pea vines and did haul pea vines; and appellant agreed to pay for the hauling and did make part payment therefor. The contract was fully performed by appellee. The dispute here relates to which of two alleged contracts is to be enforced. In the *Story* case the dispute was as to whether there was any contract at all to be enforced. The distinction is clear and readily apparent. It cannot be seriously contended that the *Story* case in any sense abridges or overrules the *Kergil* case and those following it.

**The Legal Doctrines of Modification, Discharge, Performance or Release Are Not Applicable.**

Appellee does not quarrel with the general rule that subsequent acts of the parties affecting and bearing upon their contractual relationship can be generally shown by parol evidence. However, this rule is wholly inapplicable under the facts of this case. There is no evidence showing modification, discharge, performance, release or abrogation of the written contract of the parties. The only evi-

dence even approaching such a state of facts is to be found in the testimony of Mr. Stoddard (Tr. 55-56, 59), the depositions of Mr. Stoddard (Ex. 8, p. 9-11), the testimony of Mr. Krause (Tr. 65-67) and his deposition (Ex. 7, p. 28, 29, 35, 38).

The fair thrust of this testimony is that appellant's witness says appellant was billed weekly by appellee and that appellee was paid weekly at the rate of \$4.75 per hour. Appellee, on the other hand, testified that the weekly billings and weekly payments covered payment of only a portion of the agreed rate. The statements submitted by appellee (Ex. 12) clearly show both the \$4.75 rate, the approved rate (higher rate), and the *difference* between the two rates. Each of those columns was extended and totaled, so that each weekly statement disclosed the balance still owing for the week's hauling after crediting the contemporaneous weekly payment. How then can it be seriously argued that the parties, even through agents, (whose authority so to do is not established) settled their account weekly, or effected an accord and satisfaction, or effected a modification of their written agreement, or effected a discharge or release, or accepted part performance and waived further performance?

Moreover, as disclosed by the myriad of cases hereinbefore cited, suits on contracts for public carriage speci-

fixing a rate prescribed by or subject to the approval of an appropriate governmental regulatory body are not subject to the defenses of fraud, waiver, estoppel, mistake or any other traditional defense, short of payment of the approved rate. The defenses asserted by appellant are inapplicable here, in view of the declared public policy against rate discrimination.

### CONCLUSION

The judgment of the trial court should be sustained, upon the authorities cited herein, (1) to assure to the appellee his entitlement under the law and the written memorial of the parties; and (2) to effectuate the declared public policy of the sovereign State of Oregon prohibiting rate discrimination between carriers and prohibiting deception by sham contracts entered into for immoral intendments.

*Respectfully submitted,*

LYON, BEAULAUER & AARON

and

COREY, BYLER & REW

*Attorneys for Appellee*

**CERTIFICATE**

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this ..... day of October, 1967.

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*of Attorneys for Appellee*

## APPENDIX

ORS 756.580 Suits to set aside findings and order of commissioner. (1) Parties to any proceedings before the commissioner may, when aggrieved by any findings of fact, conclusions of law or order, including the dismissal of any complaint or application by the commissioner, prosecute a suit or proceedings against the commissioner to modify, vacate or set aside such findings of fact, conclusions of law or order.

(2) Such suit may be commenced by any party so aggrieved in the Circuit Court for Marion County, in the circuit court for the county in which any hearing is held in the proceedings in which the order was made, or in the circuit court for the county in which is located the principal office of any defendant in any such proceedings before the commissioner, and jurisdiction of any such suit hereby is conferred upon the circuit court for any of such counties to hear and determine such suit.

(3) In such suit, a copy of the complaint shall be served with the summons. The commissioner shall serve and file his answer to such complaint within 10 days after the service thereof, whereupon the suit shall be at issue and stand ready for trial upon 10 days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in the court, and the circuit court always shall be open for the trial thereof. Any such suit shall only be commenced within 90 days after the filing of the order in the proceeding before the commissioner.

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ORS 767.005 (5) "Common carrier" means:

(a) Any person who transports for hire or who holds himself out to the public as willing to transport for hire, compensation or consideration by motor vehicle, persons



or property, or both, for those who may choose to employ him; or

(b) Any person who leases, rents or otherwise provides a motor vehicle for the use of others and who in connection therewith in the regular course of business provides, procures or arranges for, directly, indirectly or by course of dealing, a driver or operator therefor.

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ORS 767.020 Declaration of policy. (1) The business of operating as a motor carrier of persons or property for hire upon the highways of this state is declared to be a business affected with the public interest, and that regulated competition is desirable when it is deemed to be in the public interest.

(2) The rapid increase of motor carrier traffic and the fact that under existing law many motor trucks, trailers and busses are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that:

(a) More stringent regulations should be employed, to the end that the highways may be rendered safer for the use of the general public;

(b) The wear of such highways be reduced;

(c) Minimum of inconvenience to other users of the highways be effected;

(d) Minimum hindrance and stoppage to other users of the highways compatible with needs of the public for adequate transportation service, be effected;

(e) The highways be safeguarded from improper use or unnecessary usage;

(f) Operation by irresponsible persons or any other

operation threatening the safety of the public or detrimental to the general welfare be prevented;

(g) Discrimination in rates charged be eliminated;

(h) Congestion of traffic on the highways be minimized;

(i) The various transportation agencies of the state be adjusted and correlated so that public highways may serve the best interest of the general public; and

(j) Statutes be passed to provide a method of assessing privilege taxes to enable the further construction of highways and to provide for the operation, preservation and maintenance of highways already built.

(3) The legislature hereby declares that to effect the ends and purposes listed in this section, this chapter is adopted.

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ORS 767.055 When carrier is prima facie common carrier. Evidence that any carrier holds or has obtained at any time, in his own name or for his benefit, contracts for the transportation of property with more than five shippers or consignees, is prima facie evidence that such carrier is, in fact, a common carrier. Showing may be made to the contrary by, for or on behalf of such carrier by evidence overcoming such prima facie evidence.

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ORS 767.105 Necessity for permit for commercial transportation of persons or property on public highways. (1) No person shall operate any motor vehicle, whether loaded or empty, on any highway in this state as a common carrier, contract carrier or private carrier in the transportation of persons or property or both without first applying for and obtaining, in addition to any license required by any other law, a permit from the commissioner covering the proposed operation.

(2) Every person who engages for compensation to perform a combination of services which includes transportation of property of others upon the public highways is subject to the jurisdiction of the commissioner as to such transportation and shall not engage upon the same without first having obtained a common carrier or contract carrier permit to do so.

---

ORS 767.125 Applications for permits. (1) The commissioner shall prescribe forms of applications for permits for the use of applicants and shall make regulations for the filing thereof.

(2) On the case of common carriers and contract carriers, the application shall state:

(a) The ownership, financial condition, equipment to be used and the combined weight thereof;

(b) The physical property of the applicant;

(c) Character of service, whether transportation of property or of persons;

(d) The district or territory in which the operation is to be conducted, and if upon regular route, the termini thereof; and

(e) Such other information as the commissioner may require.

(3) [Private carrier not applicable here.]

---

ORS 767.190

. . .

(e) Has repeatedly refused or has repeatedly failed, after having been requested to do so, to furnish service

authorized by permit or granted by license. The commissioner in such cases may also, in his discretion, restrict the permit or license to conform with operations conducted.

(f) Has not, except for reasons beyond his control, furnished service authorized by his permit or license for a period exceeding six consecutive months immediately preceeding the filing of the complaint in the proceeding; or, in the case of a common or contract carrier authorized to transport logs, poles or piling, has not, except for reasons beyond his control, furnished service authorized by his permit or license to transport logs, poles or piling for a period exceeding 12 consecutive months immediately preceding the filing a complaint in the proceeding. The commissioner in such cases may also, in his discretion, restrict the permit or license to conform with operations conducted.

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ORS 767.420 Contract carriers, regulation of. (1) The commissioner shall supervise and regulate all contract carriers of persons or of property, or both, and, with respect thereto, exercise and perform all the powers and duties stated as subsections (1), (2), (3), (6) and (7) of ORS 767.405, except that he shall not require contract carriers to be or become common carriers.

(2) No contract carrier shall give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with patrons of any common carrier, or subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage, or by unfair competition destroy or impair the service or business of any common carrier or the integrity of the state's regulation of any such service or business.

(3) To the end that the commissioner may enforce these provisions, each contract carrier, except carriers engaged exclusively in transporting logs, poles or piling, shall file with the commissioner copies of his contract, immedi-

ately upon the making of such contract, including the rates, fares, charges and practices called for or contemplated in the performance of the contract, for review and revision and approval or modification as to rates, fares, charges and practices by the commissioner. No contract carrier shall enter upon the performance of any contract contemplated by this section, until approval of such contract has been given by the commissioner.

(4) The commissioner has jurisdiction over said rates, fares, charges and practices to the same extent as is required by ORS 767.410, in the case of common carriers, and ORS 767.410 is by this reference made applicable to contract carriers and the commissioner shall apply and enforce the same accordingly; provided, the commissioner has no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the transportation from the point of origin to packing or processing plants, or from the point of origin or from packing or processing plants to the nearest market or shipping points, when not transported in competition with common carriers or railroads.

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ORS 767.470 Civil penalty for violation of chapter or order of commissioner. (1) In addition to all other penalties provided by law, every person who violates or who procures, aids or abets in the violation of this chapter or any order, rule, regulation or decision of the commissioner shall incur a penalty of \$100 for every such violation.

(2) Each such violation shall be a separate offense and in case of a continuing violation every day's continuance is a separate violation. Every act of commission or omission which procures, aids or abets in the violation is a violation under this section and subject to the penalty provided in this section.

(3) Such penalty shall not be imposed except by



order following complaint and hearing as provided in ORS 756.520 to 756.570. Such proceeding may only be commenced within two years following the date of the violation complained of.

(4) The commissioner may, upon written petition therefor received within 15 days after the penalty order is served, mitigate any penalty provided for in this section or discontinue any action at law to recover the same upon such terms as he deems proper.

(5) If the amount of such penalty is not paid to the commissioner, the Attorney General shall bring an action in the name of the State of Oregon in the Circuit Court of Marion County to recover such penalty. The action shall not be commenced until after the time has expired for an appeal from the findings, conclusions and order of the commissioner. In all such actions the procedure and rules of evidence shall be the same as an ordinary civil action except as otherwise provided in this chapter.



No. 22091

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United States  
Court of Appeals  
for the Ninth Circuit

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SMITH CANNING & FREEZING CO.,  
a corporation,

*Appellant,*

v.

LLOYD KRAUSE, INC., a corporation,

*Appellee.*

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**APPELLANT'S REPLY BRIEF**

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*Appeal from the United States District Court  
for the District of Oregon*

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FILED

NOV 14 1967

WM. B. LUCK, CLERK

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---

*Appeal from the United States District Court  
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---

**SUPPLEMENTAL STATEMENT OF CASE**

There is a concerted effort in appellee's brief to obscure and distort the controlling facts in this case. Therefore, it becomes necessary for the appellant to set the record straight by a more detailed statement of the facts.

Contrary to appellee's assertion, the record does substantiate the fact that no common carrier had trucks or equipment necessary to haul the green peas on the vines from the fields to the vining stations. Lloyd Krause, the appellee's alter ego and principal

owner, testified in this area on pages 31 through 35 of his deposition (Ex. 7). The carriers he mentions in this testimony are contract carriers and not common carriers. See Exhibits 37 and 38. With respect to others being equipped to haul for appellant, Krause testified beginning at Line 22, on Page 34 of his deposition as follows:

Q Do you know of anybody else in this area who is equipped to haul the peas for Smith Canning and Freezing Company during these years that you hauled them?

A No.

Q Do you know of anybody that was equipped to do so?

A No, I don't.

Again, contrary to appellee's assertion, the evidence in the record abundantly and without contradiction shows that appellee accepted the payments made by appellant in full satisfaction and discharge of appellant's obligation for the hauling services. This is made clear from the only three sources of evidence in the record. Firstly, it is proven without contradiction in the testimony of Mr. Stoddard when he testified that the weekly payments according to the billings were accepted in satisfaction of appellant's obligation and without any complaint. Tr. 59.

The second source of evidence proving that appellee



accepted appellant's weekly payments in full satisfaction of its obligations are exhibits 31 through 36. These exhibits primarily consist of the weekly billings presented by appellee, the cancelled checks of appellant in payment of these billings, and a carbon copy of the check and the detachable stub. A sample of these documents, showing the billing and payment thereof for the week ending July 25, 1964, is contained in the appendix to this reply brief.

Even a cursory examination of exhibits 31 through 36 shows that appellee billed appellant for a specific and itemized amount of money each week and that amount was paid and accepted in full satisfaction. For example, exhibit 31 shows that the appellee billed appellant seven times during the pea harvest season of 1960 and received an equal number of payments totaling \$136,722.68. The billings invariably show a sum due in the far right hand column. Almost as invariably, there are corrections made on the billings and adjustments in later checks corresponding to them. And the responsive payments by appellant invariably relate to appellee's billings and the detachable stubs on the checks sent to appellee show by such explanatory statements as "hauling June 5-11, 1966" that they were intended to be accepted as payment in full for all hauling during the time specified. Hence, there

can be no doubt that appellee accepted these payments and cashed these checks in full satisfaction of appellant's obligations to make payment.

All in all, exhibits 31 through 36, covering all of the pea harvesting seasons involved in this case, show that more than 50 times appellee billed appellant for hauling services. Numerous adjustments were made and differences settled, none of which related in any way to the sums of money sought by appellee in this case. And, taking into consideration these adjustments and settlements of differences, appellant responded to these 50 odd billings by giving appellee a check in the amount of the precise sum asked for by appellee. And, in turn, appellee accepted and cashed these checks with full knowledge that they were intended as payment in full of the obligations of appellant. This should be enough to show that the record does substantiate appellant's contentions. But there is yet another source of evidence that is equally potent.

We turn now to the deposition of Lloyd Krause, being Exhibit No. 7. On page 10, line 12, he said: "I knew that the contracts read one rate and we got paid another rate." On page 15, he testified as follows:

Q Didn't you testify that the rate you agreed to was different than the rate you put on this contract that you sent in?

A Up until 1960, yes.

Q What rate were you paid in 1960?

A \$4.75.

Q All right. What were you paid in 1961?

A \$4.75.

Q When did you learn that you were paid \$4.75 in 1961?

A In 1961.

Q All right. Would the same be true in all subsequent years to, and including, 1965?

A Yes.

At page 17, line 1, Krause testified:

Q You are not saying that you didn't agree upon these—this rate of \$4.75?

A I agreed upon it; I had to. I didn't have any choice if I was going to stay in business.

And on page 27, line 16, he said:

Q But you knew you were paid at a rate always less than the contract rate, as the contract was filed with the Public Utilities Commission?

A Yes. I am not that dumb.

Q Do you have all the records that were prepared by your employee, Mrs. Warren?

A Yes. Our attorney has them.

Q And what do those records consist of?

A I don't know for sure. They consist of the billings for the hours worked by the trucks, I guess.

There are numerous other statements of Mr. Krause in his deposition which make it abundantly clear that appellee accepted the appellant's payments, totaling more than \$600,000.00, in full satisfaction for appellee's hauling services during the six years involved in this case.

### SUMMARY OF ARGUMENT

The reply of appellant to the argument set forth in appellee's brief may be summarized as follows:

1. The Oregon PUC lacked statutory power or jurisdiction to regulate rates for the hauling done by appellee for appellant and its attempt to regulate was and is null and void, without legal effect and is subject to collateral attack.

2. The Oregon PUC made no determination that "competition" as intended in the statute (ORS 767.420 (4)) existed. There is no evidence in the record that any such competition existed with any common carrier. A common carrier is created and exists by reason of its "holding out"

to the public and not by its certificate of authority.

3. In Oregon parol evidence is admissable to show a written contract to be a sham where such contract was not entered into to accomplish a morally objectionable purpose.

4. The doctrines of modification, discharge, performance, release, waiver, estoppel, etc., are applicable to the contractual relationship obtaining between the parties.

## ARGUMENT

### **The Oregon Public Utilities Commissioner had no Power to Fix Rates and the Attempt to do so is Subject to Collateral Attack**

The central issue in this case is whether the Oregon PUC had authority to fix the hauling rates which appellee had to charge and appellant had to pay, thereby taking away from them the power to contractually set their own rate. It is the position of appellant that the PUC did not have such authority and that, without it, appellee's house of cards falls of its own weight and that there is no theory of law which can sustain the judgment of the District Court. In clear and unambiguous language the Oregon Legislature spelled out the authority or jurisdiction of the PUC to regulate



the rates of contract carriers such as appellee. The precise part of the statute, ORS 767.420 (4), applicable to the facts in this case is as follows:

“\* \* \* The Commissioner has no authority to fix rates on agricultural \* \* \* products in transportation from the point of origin to packing or processing plants \* \* \* when not transported in competition with common carriers or railroads.”

Appellant does not contend that this language of the statute withholds from the Commissioner the power to regulate the appellee as a contract carrier. There is no doubt but that the Commissioner has such authority, including the authority to require appellee to file its contracts. Appellant contends, however, that the regulatory powers of the Commissioner could only affect it if such power included the power to fix rates. And appellant contends that the clear import of the above portion of the statute takes away from the Commissioner the power to fix the rates on the hauling done by appellee for appellant.

An administrative agency has no powers excepting those given to it by the statute. The agency does not determine the scope of its powers. In any case, it is the duty of the court to interpret the enabling statute to determine the scope of these powers as granted by the statute. This was done in *Gouge v. David*, 185 Or



437, 202 P2d 489 (1949), where the plaintiff was suing the defendants for malicious prosecution. The defendants had been instrumental in charging the plaintiff with the crime of selling liquor without a license from the Oregon Liquor Control Commission. The trial court granted the defendant's motion for judgments of involuntary nonsuit on the basis that the enabling statute did not grant to the Oregon Liquor Control Commission the power to grant temporary licenses while it was in the process of considering an application for renewal. The Oregon Supreme Court affirmed the lower court, after construing the enabling statutes and after applying the usual rules of statutory construction. At page 459 of its opinion, the Oregon Supreme Court said:

"A statute which creates an administrative agency and invests it with its powers restricts it to the powers granted. The agency has no powers except those mentioned in the statute. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare."

And, rejecting the contention that a practice of the Oregon Liquor Control Commission in granting temporary licenses could extend its powers, the court further said at page 462:

"17. Thus, there is no contention that the act was re-enacted after the purported administrative construction was made. Further, we know of nothing in the record that indicates that the legislature has been familiar with the practice upon which the appellant relies. There is no occasion, therefore, in this case for employing the recension enactment rule which takes the view that agency construction has the force of law if a statute is re-enacted after (1) the agency charged with its administration construed it, and (2) the legislative body was familiar with the construction when it re-enacted the statute: *Brooks v. Dewar*, 313 U.S. 354, 85 L. Ed. 1399, 61 S. Ct. 979; *Helvering v. Reynolds Co.*, 306 U.S. 110, 83 L. Ed. 536, 59 S. Ct. 423; *Railway Labor Executives' Assn. v. United States*, 38 Fed. Supp. 818."

And at page 464 the Oregon Supreme Court said:

"22. We have carefully considered the appellant's contentions that the practice described in preceding paragraphs shows that the Commission construed the act to mean that the receipt possessed by an applicant for a renewal license is a permit which authorizes him to continue his business until the Commission takes formal action upon his application. We are convinced that if the Commission had attempted to adopt a rule or regulation to that effect it would have been invalid. Administrative rules and regulations can go no further than fill in the interstices of the dominant act. They can not overcome and override any of its provisions. Since the Commission could not have done directly what the appellant claims it attempted through

the purported practice, it could not have done it indirectly. If the purported practice existed, it was unlawful. It is our duty to disregard it."

Thus, in Oregon, as announced in *Gouge v. David*, *Supra*, the court and not the administrative agency determines the scope of the agency's powers or jurisdiction. And this is done by the court whenever this jurisdictional question is presented, even in an indirect or collateral proceeding.

Reduced to the bone of contention, the issue in this case is whether the hauling done by the appellee for appellant was in competition with any common carrier. And this issue is centered around the meaning of "competition" in the language above quoted from the statute. The parties agreed that no common carrier actually hauled any green peas on the vines to the vining stations. Mr. Krause, as set forth in the above supplemental statement of case, testified that no other such hauling was done other than by contract carriers and that no other carrier was equipped to do the hauling required by appellant. And, most significantly, there is not one shred of evidence in the record to the effect that any common carrier ever held itself out as being in the business of hauling green peas on the vines to the vining stations. Under the authorities cited in appellant's brief, beginning at page 19 thereof, there could not possibly have been a common carrier without

this essential "holding out" to the public. Hence, there could not possibly have been any type of competition with a common carrier necessary to give the Oregon PUC power over the rates charged by appellee to appellant. The acts of the Commissioner in attempting to fix the rates were absolutely void and without legal effect. Both appellee and appellant had the right to disregard these void acts. And the evidence conclusively shows that this is exactly what they both did, only now at this late date appellee would like to breathe some life into these void and null acts.

State, ex rel Peterson v. Martin, 180 Or 459, 176 P2d 636, (1947), was a suit to enjoin the defendant from selling milk without a license issued by the appropriate administrative agency. The defendant actually had a license but the court concluded that it was not issued in the manner prescribed by the enabling statutes and that it was void. At page 475 the court said:

"A void act is a mere nullity, and has no legal effect whatever. Booth-Kelly Co. v. Oregon etc. R. Co., 98 Or. 21, 31 193 P. 463; 12 Am. Jur., Contracts, section 10; Pollock, Principles of Contract, 10th ed., p. 8. The certificate of license, therefore, conferred upon Mr. Martin no rights whatever. Being void, no formal proceeding to revoke it was necessary. It required no disaffirmance to avoid it."



And the following is found in 2 Am. Jur. 2d 289, § 482:

“An invalid order is not enforceable, but if for any reason an order is supposed to be invalid, it should not be ignored; the person against whom it operates should seek a modification of the order or a review. However, a void act is a mere nullity, and has no legal effect whatever, and it is not necessary to have it set aside. A void order is not binding and may be disregarded or challenged in a collateral proceeding, and it affords no protection for acts done under it.”

And, again in 2 Am. Jur. 2d 303 § 495, we find the following statement to the effect that void administrative determinations are subject to collateral attack:

“Many cases applying the rule that administrative determinations are not subject to collateral attack recognize that the rule depends upon the existence of jurisdiction in the agency, and it is generally held that, like the judgment of a court, an administrative decision made by an agency acting in a judicial or quasi-judicial capacity is open to collateral attack on the ground that the decision is void for lack of jurisdiction over the person or the subject matter—that is, made without statutory power or in excess thereof.”

The above quotation from Am. Jur. 2d is fully supported by *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 92 L. Ed. 580, 68 S. Ct. 426, and other respectable authority there cited.

### **The Oregon PUC Made No Administrative Determination of the Existence of the Requisite Competition**

Although appellant contends as hereinabove indicated that such act would be void, the record in this case does not show any evidence to the effect that the Oregon PUC made any administrative determination of the existence of the competition required by ORS 767.420 (4). PUC order No. 37893 dated 6-27-61, Exhibit 14, does not purport in any way or manner to make a determination of the requisite competition with a common carrier in order to give the Commissioner power to fix the rates. Properly so. That hearing and determination only had to do with the transfer of the contract carrier permit from Lloyd Krause individually to Lloyd Krause as a corporation. As conceded, the Commissioner had full power and authority to generally regulate Krause as a contract carrier in every respect. But the Commissioner did not, as expressly provided in the statute, have power to fix the rates charged by Krause when doing the type of hauling he did for appellant. Likewise, the Commissioner undertook to make no administrative determination in the letters approving the contracts that were filed by the appellee. Exhibit 13. It is clear that the enabling statutes required and now require a contract hauler to file his contracts with the Commissioner. But this affords



no basis for the Commissioner to acquire greater power or jurisdiction than is afforded to him by the statute. It is true that, in the process of examining the contracts filed by Krause, the Commissioner injected himself into the area of fixing the rate. This he did officiously, completely outside of his statutory power and his act in doing so is absolutely without legal effect and is void. However, this act of the Commissioner of approving the contracts filed with him did not rise to the dignity of an administrative determination that the requisite competition with a common carrier existed. But, rather, merely evidences the fact that the Commissioner assumed that he had the requisite power and jurisdiction. This is the inescapable conclusion to be derived from the testimony of the Commissioner's employee, Mr. Singleton. It is clear from Mr. Singleton's testimony that his interpretation of the words "competition with common carriers" in the statute bear no relationship to their clear import and the legislative intent. On direct examination (Tr. 9) he testified that the hauling of appellee for appellant was competition with common carriers. But it clearly develops in his testimony that he based this "determination" of competition on the existence in Oregon and Umatilla County of common carrier holding certificates calling for "general commodity, unrestricted." Tr. 13. Later (Tr. 16, line

3) Mr. Singleton more clearly expressed himself when he said: "Historically, we consider competition to mean those common carriers possessing the operating authority to perform the service proposed to be performed by the contract carrier under consideration." It later developed in the cross-examination of Mr. Singleton that the Oregon PUC was not in position to make any determination concerning actual competition (Tr. 19) and that it would make no difference to the so-called "determination" whether there was a common carrier in the actual business of hauling peavines with the peas in the pods to the vinery as was required and actually done by the appellee for appellant. From this testimony and all of the evidence in this case, it is clear that the Oregon PUC did not make any sort of a determination of "competition" as that term is used in the express limitation on the authority to fix rates on the hauling done by appellee for appellant. The PUC's so-called determination would actually be diametrically opposed to the definition of common carrier set forth in ORS 767.005 (5) (a), as set forth on page 19 appellant's brief.

In *Miles v. Enumclaw Co-op Creamery Corp.*, 121 P2d 945, 12 Wn. 2d 377, the plaintiff was attempting to recover from the defendant the difference between the rate established for common carriers and the rate that the parties had agreed upon for the hauling of

cream, which agreed rate had been paid by the defendant to the plaintiff until such time as the defendant terminated the arrangement. This case is actually decisive of all of the issues involved in this appeal and the Washington court said at page 946:

“(1) The basic question for determination is whether respondent was a common carrier. If he was such, he was bound to charge and collect the rate fixed by the order of the department of public service \* \* \*. The respondent seems to contend that he became a common carrier ipso facto when he was granted a permit as such and complied with the law and the regulations pertaining to common carriers. With this contention, we cannot agree.

“(2, 3) The state, under its regulatory powers, cannot, by legislative fiat or through its administrative officers, convert a private or contract carrier into a common carrier. \* \* \* While what constitutes a common carrier is a question of law, the status of a carrier, as such, must be determined from his method of operation. \* \* \*.”

Hence, it is what a carrier does that determines whether or not it is a common carrier. What its certificate or permit says is immaterial. There is no evidence in the record that any carrier was in the business of holding itself out to the public as a hauler of green peas on the vine from the fields to the vining stations at any time or place material to this lawsuit. There being no evidence that a common carrier existed, there certainly could be no evidence that the appellee was in competi-

tion with a common carrier while doing the hauling for appellant.

**Parol Evidence is Permissible to Show a Written Contract is a Sham Where Such Contract is not Entered Into to Accomplish a Morally Objectionable Purpose**

*Kergil v. Central Oregon Fir Supply Co.*, 213 Or 168, 323 P2d 947, and the subsequent Oregon cases following it, stand for the narrow minority rule to the effect that parol evidence is inadmissible to show a contract to be a sham when it was entered into for a morally objectionable purpose because the court would thereby aid in the accomplishment of such purpose. See the quotation from *Carolina Casualty Insurance Co., v. Oregon Automobile Insurance Co.*, 242 Or 407, 408 P2d 198, appearing on page 53 of appellee's brief. In this same quotation the Oregon court is careful to say that at that time (1965) there was no Oregon decision on point where no morally reprehensible purpose is to be accomplished by the writing not intended to have legal effect. We now have such a case in *Story v. Hamaker*, 84 Or Adv Sh 145, 423 P2d 185, (1967). This case is discussed on page 32 of appellant's brief. And appellee attempts to distinguish it on pages 57 and 58 of its brief. This cannot possibly be done. It is properly distinguishable from the *Kergil* case in that *Story v. Hamaker* the refusal to enforce the sham contract



would not accomplish any moral purpose. By the same token, in the case at bar no illegal or immoral purpose was intended by the writings filed with the Oregon PUC by appellee and no illegal or immoral purpose will be accomplished by refusing to lend the court's aid in enforcing those contracts. On the contrary, the effect of enforcing those contracts will be to give appellee a large sum of money in the form of a windfall. Further, such enforcement would make valid the illegal acts of the Oregon PUC in attempting to fix the rate when the hauling was clearly not in competition with any common carrier. This would defeat the public policy of the State of Oregon and not serve it.

Also, Kergil, and the other cases following it, place considerable emphasis on the fact that the third party was misled by the sham contract. In the case at bar, the Oregon PUC was not misled in any way. Krause's permit as a contract carrier was not issued as a result of the filing of the contracts. Such permit was issued as a result of a hearing similar to that evidenced by Exhibit 14, whereby the permit was transferred to the Krause corporation. The Oregon PUC was not in any way misled into usurping the power to fix rates contrary to the express language of the statute. Its officiousness in this respect was historical. Tr. 16. Certainly, the Oregon PUC was not misled in any way in

1961, the year when appellee did not file the written contract. Likewise, the PUC could not have been misled in any way in 1964. Appellee did not file the written contract in that year until July 29, 1964. Ex. 13 (c). By this time appellant had already paid appellee more than \$70,000 and the season was practically finished. Ex. 35.

Actually, it was the Oregon PUC that attempted to mislead appellant and appellee into believing that the PUC had power to fix the rate. They chose to ignore this void act. And the law permits them to do so. Appellee maintained this position until such time as the PUC, again maintaining its officious position, put the bug into appellee's ear and advised that the difference between the rate paid and the rate illegally set by the PUC could be collected from appellant. See Exhibit No. 39. There is no doubt but that, if the PUC was attempting to have appellee prosecuted under the applicable statutes for not collecting the proper rate, the tune would be different and appellee would be defending itself by saying that the acts of the PUC in attempting to fix the rate were void and without legal effect. This would be a perfect defense. In the same vein, appellant says that appellee can base no legal right on the void acts of the PUC.



**The Doctrines of Modification, Discharge,  
Performance, etc., are Applicable**

There is very little that we can add to this heading over and above what is said in appellant's brief. Appellee seems to admit that these legal doctrines would be applicable if supported by the evidence and if they do not run contrary to the law which says that a common carrier must collect the rate legally fixed by the proper administrative agency. The evidence is overwhelming that the appellee asked for and received the weekly payments of appellant in full satisfaction of all of appellant's obligations. It is equally clear under the law that the Oregon PUC had no authority to fix rates.

**CONCLUSION**

The relationship between appellant and appellee was purely a matter of a private contract. The Oregon PUC was misled only by its misconception of the extent of its powers. No payment due the State of Oregon was evaded. Tr. 27. The appellee is entitled to no additional compensation as a matter of fact and law. As a matter of law, there are no policy reasons for rewarding appellee. The judgment of the District Court should be reversed.

Respectfully submitted,

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Attorneys for appellant

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In the Foreign Trade of Japan  
Collection Japan  
Wick Lardner 7/23/62

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**CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in compliance with those rules.

Date: . . . . . day of November, 1967.

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Of Attorneys for Appellant















